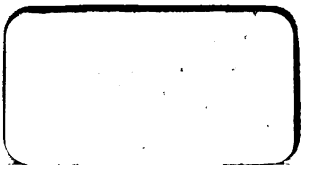

copy 1

ELEMENTS

OF THE

LAW OF DOMESTIC RELATIONS

AND OF

EMPLOYER AND EMPLOYED.

BY

IRVING BROWNE.

SECOND EDITION, REVISED.

BOSTON:
THE BOSTON BOOK COMPANY.
1890.

University Press:
JOHN WILSON AND SON, CAMBRIDGE.

PREFACE TO THE FIRST EDITION.

THIS work is a sort of primer of the legal principles relating to the law of Domestic Relations. It is an attempt to present a brief but comprehensive summary of the body of this law, as it is furnished in the great works of Mr. Bishop and Mr. Schouler, bearing the same title, and in Mr. Wood's excellent treatise on Master and Servant.

It has long been a wonder to me that a novice can ever learn the laws from the great commentaries, so loaded with authorities, so hampered with distinctions, so diffuse in discussion; and it has seemed to me desirable that there should be elementary books to put into the hands of students, leading up to the commentaries. I have often felt, in my labors as practitioner, editor, reporter, and lecturer, that such books would frequently serve a useful purpose as manuals for those who have passed their novitiate, and who are called upon suddenly to refresh or confirm their memories, or direct their researches. I have endeavored to give references to the latest decisions, as an especial aid to practitioners. Such works as the present are not designed to supersede,

but to preface, and perhaps accompany, the elaborate treatises.

My obligations, in the present volume, to Mr. Bishop and Mr. Wood, and more especially to Mr. Schouler, are evident. These writers have exhausted their subjects. The art of the author of such a book as this consists in expressing principles with the greatest conciseness and simplicity, and in knowing what to leave out. How well I have succeeded in this task — not a very easy one — must be left to others to say. If I have in any degree simplified the learning of the law by the student, I shall be satisfied.

I. B.

ALBANY, Sept. 1, 1883.

CONTENTS.

CHAPTER IV.

HUSBAND AND WIFE.

CHAPTER V.

HUSBAND AND WIFE.

CHAPTER VI.

HUSBAND AND WIFE.

CHAPTER VII.

PARENT AND CHILD.

CHAPTER VIII.

GUARDIAN AND WARD.

CHAPTER IX.

INFANCY.

CHAPTER X.

MASTER AND SERVANT.

TABLE OF CASES.

CHAPTER I.

THE Domestic Relations are those of Husband and Wife, Parent and Child, Guardian and Ward, and Master and Servant.

HUSBAND AND WIFE.

Under the head of Husband and Wife we have to consider: first, the formation of the relation, or Marriage; second, its rights, duties, and liabilities; third, its dissolution, or Divorce.

MARRIAGE.

In order to form a valid marriage the parties must not be within the prohibited degrees of kindred; must be of proper social condition; must be mentally and physically competent; of proper age; unmarried; must give an intelligent assent; and that assent must be evidenced in accordance with the prescribed forms of law. We are therefore in this connection to treat, first, of blood; second, of social condition; third, of mental capacity; fourth, of physical capacity; fifth, of age; sixth, of prior marriage; seventh, of force or fraud; eighth, of the evidence of the assent to the contract.

1. *Blood.* — Law forbids the marriage of near relations. Such marriages are not only forbidden by divine law, but physiological experience shows that

the issue of such connections is nearly always degenerate, frequently monstrous. The English law draws the line of prohibition at first cousins. The children even of first cousins are apt to be mentally and physically feeble. Close intermarriage between royal and other aristocratic families has been observed to breed a degenerate offspring. The English law not only prohibits marriage between persons thus allied by blood, or consanguinity, but extends the prohibition to affinity, or the relationship between the husband and the wife's kindred, and the wife and the husband's kindred. Thus in England marriage with a deceased wife's sister is prohibited. This has never obtained in this country.[1] The contrary has been held in Vermont.[1*] In Massachusetts, marriage between step-father and step-daughter is forbidden.

[1] Except formerly in Virginia. Kelly *v.* Scott, 5 Gratt. 499.

[1*] Blodget *v.* Brinsmaid, 9 Vt. 27. See 2 Kent Com. 85, note *a*. The basis of the idea that such marriages are immoral is this: In Leviticus v. 6, it is said, "None of you shall approach to any that is near of kin to him." This, we are told by the theologians, is a mistranslation; it should be "flesh of his flesh." The Bible also says that husband and wife are "one flesh." Therefore the wife's sister is flesh of the husband! Many times have the House of Commons by enormous majorities voted to abolish this rule, and eight times have the House of Lords by narrow majorities preserved it. A few years ago, the measure was saved by a majority of eleven, precisely the number of bishops in the upper house voting that way. Very recently the measure was defeated in that house by a majority of five. The innate sense of decency on the subject of such marriages will generally save a community from error. Thus, although in New York a marriage between nephew and aunt is not void, yet it is so abhorrent that an action for breach of promise of such a marriage, the promise having been made in a State where such a marriage is pronounced incestuous, will not be maintained in this State. Campbell *v.* Crampton, 8 Abb. N. Cas. 363; 18 Blatch. 150.

In most of our States the matter is regulated by statute.

2. *Social Condition.* — At common law, and in England, race, color, and social rank constitute no impediment to marriage. In this country, in many States marriage is by statute forbidden between whites and negroes or Indians. Such laws prevail in Alabama, California, Delaware, Florida, Georgia, Indiana, Kentucky, Maine, Maryland, Michigan, Missouri, Nebraska, North Carolina, Oregon, Rhode Island, Tennessee, Texas, Virginia, and West Virginia. In six of these States slavery never prevailed. In Maine and Rhode Island, as well as in North Carolina, marriages between whites and Indians, as well as between whites and negroes, are prohibited. These laws have recently been pronounced valid within the Federal constitution, since the abolition of slavery, by several State courts,[2] but the question is yet to be settled by the Federal supreme court.[2*]

3. *Mental Capacity.* — An intelligent consent is essential to a valid marriage. Hence an idiot or

[2] State *v.* Gibson, 36 Ind. 389; s. c., 10 Am. Rep. 42; State *v.* Kennedy, 76 N. C. 251; s. c., 22 Am. Rep. 683; Green *v.* State, 58 Ala. 190; s. c., 29 Am. Rep. 739; Kinney's Case, 30 Gratt. 859; s. c., 32 Am. Rep. 690; Frasher *v.* State, 3 Tex. Ct. App. 263; s. c., 30 Am. Rep. 131.

[2*] But that court, in Pace *v.* State, have recently held that a state statute punishing adultery and fornication, and providing a greater punishment for each "if any white person and any negro intermarry or live in adultery or fornication with each other," is not invalid under the Fourteenth Amendment of the Federal Constitution. 106 U. S. 583, affirming 61 Ala. 231; 44 Am. Rep. 513.

lunatic cannot contract marriage. So of other persons who have not the capacity to understand the duties and obligations of the relation. The test usually applied in the courts is that of fitness for the general transactions of life.[3] Yet as the highest degree of intelligence is not requisite to enable one to make his will, so it is not necessary to enable him to make a valid marriage. So he may contract a valid marriage although he has a particular mental delusion, or is eccentric or morbid, provided he is otherwise of sound mind and ordinary prudence and skill.[4] Marriage contracted during temporary insanity is void;[5] but marriage contracted during a lucid interval is valid;[6] except when provided, as in England and in some of our States, by statute, that it is void during an unrevoked commission of lunacy. Drunkenness does not incapacitate, unless so great that the party does not know what he is about.[7] Deaf and dumb persons, formerly classed as idiots, may now, it is held, contract a valid marriage.[8] Kent says (2 Com. 76) that a marriage with an idiot or lunatic is absolutely void, and no sentence of avoidance is absolutely necessary; but in many States such a marriage, by statute, is not void, but only voidable.

[3] Mudway *v.* Croft, 3 Curt. Ec. 671; Anon., 4 Pick, 32; McElroy's Case, 6 W. & S. 451.

[4] 2 Kent Com. 76.

[5] Legeyt *v.* O'Brien, Milward, 325.

[6] 1 Bish. Marr. & Div. 130.

[7] Clement *v.* Mattison, 3 Rich. 83; 2 Kent Com. 451.

[8] Dickinson *v.* Blisset, 1 Dickens, 268; Harrod *v.* Harrod, 1 Kay & J. 4.

4. *Physical Capacity.* — Where impotence exists there can be no valid marriage. But impotence means physical incapacity; not mere coldness, reluctance, or unwillingness, or even absolute refusal to consent to sexual connexion.[9] Barrenness constitutes no incapacity, nor does any malformation not preventing copulation, nor any curable disability.[10] The impotency must have existed at the time of the marriage.[11] It is generally provided that the invalidity must be established by the decree of a competent court. Where the impotence is simply the result of old age, the marriage is still binding. "A man of 60, who marries a woman of 52, should be content to take her *tamquam soror*."[12] Puffendorf says such old folks are "honorary members of the matrimonial state, enjoying a title without an office." But in one case a man of 54 was decreed a divorce from a woman of 49 for impotence.[13]

5. *Age.* — The common law fixes an age of consent for a valid marriage at 14 in males and 12 in females. A marriage, either party to which was under the age of consent, may be avoided by either party on arriving at such age.[14] A marriage, either

[9] Piepho *v.* Piepho, 88 Ill. 438; Merrill *v.* Merrill, 126 Mass. 228; S. *v.* A., 3 P. Div. 72. But where there has never been any intercourse, and the wife persistently refuses, the court will infer incapacity. S. *v.* A., 3 P. Div. 72. The woman's conceded impotence, and her refusal to submit to a surgical operation, constitute a valid defence to an action for breach of promise of marriage. Gring *v.* Lerch, 112 Penn. St. 244; s. c., 56 Am. Rep. 314.

[10] 1 Bish. Marr. & Div. §§ 321–340; Deane *v.* Aveling, 1 Robt. 279.

[11] Devanbaugh *v.* Devanbaugh, 5 Pai. 554.

[12] Briggs *v.* Morgan, 2 Hag. Cons. 339.

[13] W. *v.* H., 2 Swab. & T. 240. [14] 1 Bish. Marr. & Div. § 149.

party to which was under the age of consent, may be ratified, on arriving at that age, by consent implied from continued intercourse or slight circumstances. Consent of parents is not necessary to the marriage of minors.[15] In some States such marriages are forbidden without being declared void, and penalties are denounced for celebrating or contracting them. Consent of parents was necessary by the civil law, and is now in some European countries.

6. *Prior Marriage.* — Polygamy or bigamy is denounced as a crime by all Christian communities, and polygamous or bigamous marriages are void. The polygamous marriages of Utah have recently been pronounced invalid by the United States Supreme Court, under the Federal statute.[16] But to render a subsequent marriage void, the former must have been valid.[17] At common law the subsequent marriage is void *ab initio*, but statutes have relaxed this rule by declaring that such marriages shall be void only from the time when so pronounced by the decree of a competent court. In most States, where an absolute divorce is granted, the offending party is prohibited from marrying again in the lifetime of the other, and such marriage is void.[18] But in the absence of specific statutory provision to the contrary, this can have no extra-territorial effect; and if

[15] 2 Kent Com. 85.

[16] Reynolds *v.* U. S., 98 U. S. 145.

[17] Bruce *v.* Burke, 2 Add. Ec. 471; Patterson *v.* Gaines, 6 How. 550.

[18] Cropsey *v.* Ogden, 11 N. Y. 230.

the prohibited party contracts a marriage in another State, even if he went there for the express purpose of evading the prohibition, the marriage if valid there will be recognized as valid in the former State.[19]

7. *Force or Fraud.* — Kent says "a marriage procured by force or fraud is void *ab initio*, and may be treated as void by every court in which its validity may be incidentally drawn in question."[20] So says Schouler.[21] But this has recently been denied, and it has been held that such a marriage can only be avoided by the person defrauded, in his lifetime.[22] Statutes have changed the rule in some States, and attached the invalidity to the time of a decree of nullity.

Force implies physical restraint; fraud implies deception. The general rule is that the force must be such as would naturally serve to overcome the will. The question of the amount of force depends upon circumstances. If the person exercising the force occupies a position of authority and influence over the other, as guardian, a less degree of force

[19] Van Voorhis *v.* Brintnall, 86 N. Y. 18; 40 Am. Rep. 505; Thorp *v.* Thorp, 90 N. Y. 602. There is a singular statutory provision in New York, that such a prohibited party may be permitted by the court to marry again, upon his showing that the other party has re-married, that five years have elapsed since the divorce, and that his conduct has been uniformly good.

[20] 2 Kent Com. 76. [21] Sch. Dom. Rel. 35.

[22] Tompert's Exec. *v.* Tompert, 13 Bush, 326; 26 Am. Rep. 197. But the committee of a lunatic may bring a suit for absolute divorce for his ward. Baker *v.* Baker, 5 P. Div. 142; 6 id. 12. The guardian of an insane woman cannot maintain an action for her divorce. Birdzell *v.* Birdzell, 33 Kans. 433; 52 Am. Rep. 539.

will suffice.[23] A marriage procured by illegal arrest may be avoided, and so where the arrest was legal but malicious.[24] But when a man under legal arrest for seduction reluctantly marries the woman, the marriage will not be set aside.[25] The right to avoid a marriage for duress exists although it may not be included among the statutory grounds.[26]

As to Fraud. — The fraud which will avoid a marriage must go to the essence of the contract. *Caveat emptor*, the rule of trade, seems to apply. So fraudulent representations by one party as to birth, age, social position, fortune, health, manners, or character will not suffice. "The law makes no provision for a blind credulity, however it may have been produced." [27] So where a man represented that his former wife was dead, but she was living, they having been divorced; and where a woman concealed the fact that she had some time before given birth to an illegitimate child; these facts were held not to avoid the marriages.[28] A false personation would undoubtedly avoid the marriage.[29] It has been held that a concealed pregnancy by another at the time of

[23] Hartford *v.* Morris, 2 Hag. Cons. 423.

[24] Reg. *v.* Orgill, 9 C. & P. 80; Soule *v.* Bonney, 37 Me. 128.

[25] Jackson *v.* Winne, 7 Wend. 47; Honnett *v.* Honnett, 33 Ark. 156; 34 Am. Rep. 39.

[26] Willard *v.* Willard, 6 Baxt. 297; 32 Am. Rep. 529.

[27] Wakefield *v.* Mackay, 1 Phill. 137; Varney *v.* Varney, 52 Wis. 120; 38 Am. Rep. 726.

[28] Clarke *v.* Clarke, 11 Abb. Pr. 228; Smith *v.* Smith, 8 Or. 100; Meyer *v.* Meyer, 49 How. Pr. 311, must be regarded as bad law. Hides *v.* Hides, 65 id. 17, is a case where a marriage was set aside for fraud and undue influence through the means of spiritualism.

[29] 2 Kent Com. 77.

the marriage, followed by birth, will avoid the marriage.[30] This doctrine has recently been denied in North Carolina.[31] The rule is the subject of enactment in some States. Where a white man was charged in bastardy proceedings by a white woman with being the father of her child previously born, which he had not seen, and he married her believing the child to have been his, and it turned out that the child was a mulatto, this was held fraud sufficient to avoid the marriage.[32] If the fraud is not that of a party, but of third persons, without his knowledge, the marriage is not invalid.[33] Generally, a third person cannot interfere to avoid a marriage for force or fraud.[34] Ratification of a forcible or fraudulent marriage by the injured party will render it valid; as by connexion after removal of the restraint or knowledge of the fraud.[35]

8. *Evidence of the Assent to the Contract.* — At common law marriage is a civil contract, to which consent alone is essential. It requires no legal forms nor religious solemnities, nor special mode of proof.[36] The common rule is, that in the absence of statutory regulation, consent *per verba de presenti*

[30] Reynolds *v.* Reynolds, 3 Allen, 605; Montgomery *v.* Montgomery, 3 Barb. Ch. 132; Baker *v.* Baker, 13 Cal. 87; Allen's Appeal, 99 Penn. St. 196; s. c., 44 Am. Rep. 101.

[31] Long *v.* Long, 77 N. C. 304; 24 Am. Rep. 449.

[32] Scott *v.* Shufeldt, 5 Pai. 43; note, 24 Am. Rep. 453.

[33] Sullivan *v.* Sullivan, 2 Hag. Cons. 246.

[34] McKinney *v.* Clarke, 2 Swan, 321.

[35] Scott *v.* Shufeldt, 5 Pai. 43.

[36] Dyer *v.* Brannock, 66 Mo. 691; 37 Am. Rep. 359.

with or without consummation, or *per verba de futuro* with consummation, constitutes a valid marriage.[37] The two highest legal tribunals in the world, however, namely, the House of Lords and the Supreme Court of the United States, were both equally divided in opinion on this proposition.[38] In New York, Illinois, and Rhode Island, it is now held that mere *verba de futuro*, although followed by consummation, do not constitute a valid marriage.[39]

Although "in most if not all of the United States there are statutes regulating the celebration of marriage, and inflicting penalties on all who disobey the regulations, yet it is generally considered that in the absence of any positive statute declaring that all marriages not celebrated in the prescribed manner shall be absolutely void, or that none but certain magistrates or ministers shall celebrate a marriage, any marriage regularly made according to the common law, without observing the statutory regulations, would still be a valid marriage."[40]

So a man may generally "marry himself," but even if he is a magistrate or clergyman, he cannot act as such in his own marriage, where a ceremonial marriage is required.

[37] Bish. Marr. & Div. § 227; 2 Kent Com. 87.

[38] Queen *v.* Willis, 10 C. & F. 534; Jewell *v.* Jewell, 1 How. 219.

[39] Cheney *v.* Arnold, 15 N. Y. 345; Peck *v.* Peck, 12 R. I. 485; 34 Am. Rep. 702; Hebblethwaite *v.* Hepworth, Ill.

[40] 2 Greenl. Ev. 531; Hynes *v.* McDermott, 82 N. Y. 41; s. c., 37 Am. Rep. 538; Badger *v.* Badger, 88 N. Y. 546; s. c., 42 Am. Rep. 263. *Contra:* Com. *v.* Munson, 127 Mass. 459; s. c., 34 Am. Rep. 411. See also 16 Alb. Law Jour. 217. State *v.* Walker, 36 Kans. 297, s. c., 59 Am. Rep. 556, is an interesting case, where the court refused to sanction a "free love" marriage.

Present consent without cohabitation or ceremony makes a valid marriage.[41] This however has been denied by an eminent authority.[42] But mere cohabitation without consent to marriage never makes a valid marriage.[43] An assent to a ceremony understood on both sides to be given in jest, even if the clergyman is in earnest, will not constitute a valid marriage;[44] but otherwise, if one of the parties is in earnest;[45] and where one party procures a mock ceremony to be performed by one falsely personating a clergyman, it will bind both if the other assents in good faith.[46]

Intercourse illicit in its commencement will be presumed always so to continue, and no marriage can be presumed from it.[47] Without express proof of words of consent a valid marriage may be predicated of cohabitation, acknowledgment of a marriage by the parties, reception of them by relatives and friends and in society as husband and wife, and common reputation.[48] Even though it may invalidate a subsequent marriage.[49] But not as against a prior ceremonial marriage.[50] A formal marriage being

[41] Jackson *v.* Winne, 7 Wend. 47.
[42] Jaques *v.* Pub. Adm., 1 Bradf. 499.
[43] Clayton *v.* Wardell, 4 N. Y. 230.
[44] McClurg *v.* Terry, 21 N. J. Eq. 225.
[45] Hayes *v.* People, 25 N. Y. 390.
[46] Id.
[47] Williams *v.* Williams, 46 Wis. 464; 32 Am. Rep. 466; Appeal of Reading, etc. Co., 113 Penn. St. 204; 57 Am. Rep. 448.
[48] O'Gara *v.* Eisenlohr, 38 N. Y. 296; Hynes *v.* McDermott, *supra.*
[49] Brown *v.* Bowers, 1 Abb. Ct. App. Dec. 214.
[50] Jones *v.* Jones, 48 Md. 391; 30 Am. Rep. 466.

proved, evidence that the cohabitation was reputed to be unlawful is incompetent.[50*] Where there is evidence of marital cohabitation, the presumption of marriage will not be overcome by the contrary statement of one of the parties.[50†]

Foreign Marriage. — It is a well settled principle that a marriage valid where celebrated is valid everywhere, and one invalid where celebrated is invalid everywhere.[51] It was even held at an early day, in respect to the Gretna Green marriages, that where parties leave their own State or country for the express purpose of evading the local legal requirements, marry abroad, and return, the marriage is valid.[52] This is now the law of England and of most of our States.[53] This doctrine however is subject to an exception in case of marriages regarded in the domicile of the parties as immoral or incestuous; as in England, where an Englishman met in Denmark the sister of his deceased wife, and there married her, the marriage although valid in Denmark was held void in England.[54] So, in North Carolina, a marriage between a white and a negro, residents of that State, who left that State for the purpose of

[50*] Northrop *v.* Knowles, 52 Conn. 522; 52 Am. Rep. 613.

[50†] Teter *v.* Teter, 101 Ind. 129; 51 Am. Rep. 472.

[51] Scrimshire *v.* Scrimshire, 2 Hag. Cons. 395; Hare *v.* Gibson, 32 Ohio St. 33; Oinson *v.* Heritage, 45 Ind. 73; 15 Am. Rep. 258.

[52] Compton *v.* Bearcroft, 2 Hag. Cons. 443.

[53] Medway *v.* Needham, 16 Mass. 157; Stevenson *v.* Gray, 17 B. Monr. 193; Swift *v.* Kelley, 3 Knapp, 257; Morgan *v.* McGhee, 5 Humph. 13; Wall *v.* Williamson, 8 Ala. 48; Patterson *v.* Gaines, 6 How. 550; Phillips *v.* Gregg, 10 Watts, 158; Fornstill *v.* Murray, 1 Bland, 479.

[54] Brook *v.* Brook, 9 H. L. 193; Harvey *v.* Farnie, 6 P. Div. 35.

evading the law, and were married in a State where such marriage was legal, and returned to North Carolina, the marriage was held void under the statute of that State.[55] Yet where such intent was lacking, and the negro was a resident of the other State, the marriage was held valid in North Carolina.[56] In a very recent case, the marriage of first cousins, Portuguese, one of whom was domiciled in England and the other in Portugal, where such marriages are forbidden, was upheld in England.[57] A polygamous marriage contracted by a domiciled Englishman in an uncivilized country, according to the custom of a native tribe, is invalid under English law.[58]

[55] State *v.* Kennedy, 76 N. C. 251; 22 Am. Rep. 683.

[56] State *v.* Ross, 76 N. C. 242; 22 Am. Rep. 678. See Van Voorhis *v.* Brintnall, *supra*.

[57] Sottomayor *v.* DeBarros, 3 P. Div. 1; 5 id. 94.

[58] Re Bethell, 38 Ch. Div. 220.

CHAPTER II.

DUTIES, RIGHTS, LIABILITIES, AND DISABILITIES.

THE common-law idea of marriage is that the husband and wife become one person, and that person is principally husband, the legal existence of the wife being suspended and merged in that of the husband, under whose wing or cover she is; whence she is called *feme covert*, and her condition during marriage is called *coverture*. She is subordinate to the will and dominion of her *baron* or lord. It is her duty to obey and follow him. He is the houseband or bond that holds together the house or family. He has the custody and control of her person. He may moderately chastise her. Neither can testify for or against the other. The husband becomes entitled to all her personal property, whether acquired before or after marriage, and to a tenancy during coverture and by curtesy in her real estate. She acquires no absolute interest in his property except dower. As an offset, the husband becomes alone liable in damages for all frauds and injuries committed by the wife before or after marriage, whether she brought him any fortune or not. On the other hand, he alone is entitled to compensation for the like frauds and injuries committed against her. She alone is liable for her crimes committed before marriage; but after marriage, if she commits a crime,

less than treason or murder, in his presence and by his command, it is presumed *prima facie* that he coerced her, and she is not responsible. She cannot bind herself by contract with others than her husband, nor can she contract with her husband. Neither can give or sell to the other, and neither can sue the other except for divorce. Nor after divorce can one sue the other for a wrong during coverture.[1]

Such is the common-law theory, unaffected by the doctrines of equity and irrespective of the recent statutes.[2] To particularize:

MUTUAL DUTIES.

It is the wife's duty to love, honor, and obey the husband, and it is the husband's duty to love, protect, and maintain the wife. He is bound to furnish and guard the house; to provide according to his means and condition for her maintenance; to defend her from personal insult and wrong; to be kind to her; to see that the offspring are reared with care and tenderness.

DOMICILE.

The husband is entitled to select the mutual domicile, where the wife is bound to reside, and whither she is bound to follow him. It has even been held that his ante-nuptial contract not to take the wife away from her parents is void.[3] But the wife is not

[1] Abbott *v.* Abbott, 67 Me. 304; 24 Am. Rep. 27.
[2] Schoul. Dom. Rel.
[3] Hair *v.* Hair, 10 Rich. Eq. 163.

bound to follow the husband to prison or into banishment. If he treats her cruelly, or renders her home unfit for a chaste woman, she may leave him.[4] Probably she would not be bound to follow him into an unsafe country or on a perilous journey. Some recent cases have gone great lengths in lenity toward the wife, one even holding that she may excuse herself from accompanying him on account of her dislike to be near his relatives.[5] (But this is doubtful.) But neither husband nor wife can legally be compelled to live with the other, nor to submit to sexual intercourse.[5*]

RIGHT TO PERSON AND SOCIETY OF WIFE.

The husband is entitled to the custody and possession of his wife's person and to her society and services. So he can recover his wife from any person who withholds her from him, and may recover damages against all who improperly entice her away or withhold her.[6] The wife has no corresponding right to her husband's person, but she has a corresponding right of action, for the loss of his society and companionship, against one who wrongfully procures and induces him to abandon or send her away.[7]

[4] Houliston *v.* Smyth, 3 Bing. 127.

[5] Powell *v.* Powell, 29 Vt. 148.

[5*] The Roman law did not exact any sexual intercourse. In the Greek and the Jewish law it was otherwise.

[6] Hutcheson *v.* Peck, 5 Johns. 196.

[7] Westlake *v.* Westlake, 34 Ohio St. 621; 32 Am. Rep. 397; Jaynes *v.* Jaynes, 39 Hun, 40. The wife is the natural guardian of her insane husband, and is entitled to the custody of his person, as against his relatives. Robinson *v.* Frost, 54 Vt. 105; 41 Am. Rep. 835.

Parents and near relatives stand on a different footing from strangers, and may harbor a wife who leaves her husband for good cause;[5] but even the father must relinquish the daughter to the husband if she wishes to return. The husband's right to the wife's society cannot be defeated by her action to eject him from her lands.[8]

RIGHT TO CHASTISE AND RESTRAIN THE WIFE.

At ancient common law the husband had the right moderately to chastise his wife, and the ancient idea of moderation is indicated by the permission to use for that wholesome exercise a stick not bigger than the man's thumb.[9] But under modern common law, the husband has no right to strike his wife even if she is drunk or insolent.[10] Kent intimates that the husband has the right of "gentle restraint" over the wife, but it is doubtful that he has any right forcibly to restrain or imprison her, except to prevent her misconduct. It is said in England that he may prohibit her from receiving visits from her relatives, because, as one writer says, "Although she may be very amiable, her connections may not be so."[11] There is no doubt that the husband may forcibly prevent the wife from eloping, or restrain her from

[8] Manning *v.* Manning, 79 N. C. 293; 28 Am. Rep. 324.

[9] 1 Bl. Com. 444.

[10] Com. *v.* McAfee, 108 Mass. 458; 11 Am. Rep. 383; Daniels *v.* State, 2 Tex. Ct. App. 353.

[11] Fras. Dom. Rel. 459. But the English are an ungallant people, who name the bitterest kind of beer "Mother-in-law."

acts of violence against others as well as himself.[12] Undoubtedly the wife may defend herself from her husband's violence. Either may be indicted for an assault on the other.[13]

RIGHT TO TESTIFY.

At common law husband and wife cannot be witnesses for or against one another in civil actions nor on a criminal prosecution, even by mutual consent.[14] Some writers put this on the ground of the marital unity, others on that of public policy. This rule holds even after the dissolution of the marriage by death or divorce,[15] and extends to their declarations.[16] The chief exception to this rule is in the case of criminal complaints by the one against the other for personal injuries.[17] In a suit for limited divorce on the ground of cruel treatment, the wife is a competent witness against the husband.[18] After the dissolution of the marriage, either may testify to facts not acquired by means of the matrimonial relation.[19]

LIABILITY OF HUSBAND FOR WIFE'S DEBTS.

At common law the husband remains liable for his wife's debts contracted before marriage only so long as the coverture lasts.[20] His liability ceases with his

[12] People *v.* Winters, 2 Park. Cr. 10.
[13] Daniels *v.* State, 2 Tex. Ct. App. 353; State *v.* Pettie, 80 N. C. 367.
[14] Davis *v.* Dinwoody, 4 T. R. 679.
[15] 1 Greenl. Ev. § 337.
[16] Ibid. § 341.
[17] Ibid. § 343.
[18] Even when the cruelty is excessive sexual intercourse. Melvin *v.* Melvin, 58 N. H. 569; 42 Am. Rep. 605.
[19] 1 Greenl. Ev. § 338.
[20] Heard *v.* Stamford, 3 P. Wms. 409.

wife's death, and his estate is not liable after his own death. If the wife survives the husband, her liability for her debts contracted before marriage reattaches, even though she has lost her means by the marriage.[21] The discharge of the husband in bankruptcy formerly discharged the wife's debt as well as his own,[22] but it is otherwise now.[23] Promise or part payment by one cannot take a debt out of the statute of limitations as against the other.[24]

WIFE'S CONTRACT FOR NECESSARIES.

At common law the wife's power to contract ceased with marriage. During marriage her contracts of every description were absolutely void. So a widow's agreement to pay her debt incurred during marriage was legally void.[25] She could not earn money for herself.[26] She could convey her real estate by joining in a deed with her husband, but she was not bound by her covenant in the deed, nor could she separately convey her own real estate. But the wife at common law had and still has power by an implied agency to bind her husband for necessaries for herself.

We will inquire, first, what are necessaries; and second, in what circumstances the wife may bind the husband therefor.

[20] Heard *v.* Stamford, 3 P. Wms. 409.

[21] Woodman *v.* Chapman, 1 Camp. N. P. 189.

[22] Miles *v.* Williams, 1 P. Wms. 249.

[23] Vanderheyden *v.* Mallory, 1 Comst. 483. So of the husband's discharge in insolvency. Allen *v.* Forbes, 59 Md.

[24] Ross *v.* Winners, 1 Halst. 366; Wilmer *v.* Gaither, 68 Md. 342.

[25] Meyer *v.* Haworth, 8 Ad. & El. 467; Musick *v.* Dodson, 76 Mo. 624; 43 Am. Rep. 780; Porterfield *v.* Butler, 47 Miss. 165; 12 Am. Rep. 339.

[26] Oppley *v.* Clay, 2 Man. & Gr. 172.

1. *What are necessaries.* — The wife's necessaries are such as the law deems essential to her health and comfort: food, lodging, clothing, fuel, washing, medical attendance, etc. These are to be determined, both in amount and kind, by the apparent means and social position of the husband and wife. The following are illustrations of what may or may not be necessaries for the wife: —

What are, for a married woman: Furniture of a house, when she has a decree for £380 a year as alimony: Hunt *v.* DeBlaquiere, 5 Bing. 550. Silver fringes to a petticoat and sidesaddle, worth £94, for the wife of a sergeant-at-law: Skin. 349. A horse worth $40, for the exercise of an invalid wife of a miller earning $30 a month: Cornelia *v.* Ellis, 11 Ill. 584. A set of artificial teeth: Gilman *v.* Andrus, 28 Vt. 241. A piano: Parke *v.* Kleeber, 37 Penn. St. 241. Counsel fees to a deserted wife for advice as to dealing with pressing tradesmen: Wilson *v.* Ford, 3 Ex. 63. (See Conant *v.* Burnham, 133 Mass. 503.)

What are not: £67 worth of dry goods, outfit for a watering-place, for the wife of a poor barrister: Atkins *v.* Curwood, 7 C. & P. 759. Bonnets, laces, feathers, and ribbons, to the amount of £5,287, in part of a year: Lane *v.* Ironmonger, 13 M. & W. 368. Jewelry for the wife of a special pleader: Montague *v.* Benedict, 3 B. & C. 631. Passage money to enable wife to join husband: Knox *v.* Bushell, 3 C. B. (N. S.) 334. Counsel fees in a divorce suit: Coffin *v.* Dunham, 8 Cush. 404; Clarke *v.* Burke, 65 Wis. 859; 36 Am. Rep. 631. The expense of an indictment against the husband for

assault on wife: Grindall *v.* Godmond, 5 Ad. & Ell. 755. Services of a clairvoyant prescribing medicines in mesmeric sleep: Wood *v.* O'Kelly, 8 Cush. 406. A church pew: St. John's Parish *v.* Bronson, 40 Conn. 75; 16 Am. Rep. 17. A pianette: Chappell *v.* Nunn, 20 Alb. L. J. 18. £959 worth of foreign birds for the rich wife of a poor rector: Freestone *v.* Butcher, 6 C. & P. 643. A ball dress worth $80: Sharpley *v.* Doutre, 4 Can. Leg. News, 185. Pipes, tobacco, and cigars: Bradley *v.* Murray, 66 Ala. 270.

2. *In what circumstances the husband may be bound for necessaries.* — The liability may arise where the parties live together or where they live apart.

A. — Where they live together, the husband's assent may be inferred from circumstances indicating actual assent, or the law will imply an assent from his unfulfilled duty to supply them, as by neglect or refusal. Cohabitation in itself furnishes evidence of the requisite authority, for it is not to be supposed that the husband will go in person to buy every pin or needle.[27] This presumption is strengthened by proof of the husband's assent to similar purchases.[28] But this presumption may be rebutted by proof that the husband had already furnished the wife sufficiently, or had given her ready money for such purchases.[29] But the husband may be held to have

[27] Langfort *v.* Tyler, 1 Salk. 113; Emmett *v.* Norton, 8 C. & P. 506.

[28] Jewsbury *v.* Newbold, 40 Eng. L. & E. 518.

[29] Manby *v.* Scott, 1 Sid. 109; Etherington *v.* Parrott, 2 Ld. Raym. 1006.

ratified an unauthorized purchase, either by not rescinding it upon learning it, or by his tacit consent to his wife's retaining the articles.[30] But ratification is not presumed from his merely seeing his wife wearing the articles.[31] The husband may prohibit particular persons from selling goods to the wife on his credit,[32] but notice in the newspapers will not suffice.[33] During cohabitation the wife may pledge the husband's credit against his will, if he neglects or refuses to supply her with necessaries, and in spite of an express prohibition.[34] But a husband who is able and willing to supply his wife with necessaries, and who has forbidden her to pledge his credit, cannot be held liable for necessaries bought by her; and a tradesman, without notice of the husband's prohibition, and without having had previous dealings with the wife with his assent, cannot maintain an action against him for the price of articles of female attire suitable to her station in life, and supplied to her upon his credit but without his knowledge or assent.[35]

B. — Where the husband and wife live apart, the general rule is that the husband is liable for the wife's necessaries if the separation is by his fault, but not otherwise. If the husband abandons or expels

[30] Seaton *v.* Benedict, 5 Bing. 528; Ogden *v.* Prentice, 33 Barb. 160.

[31] Atkins *v.* Curwood, 7 C. & P. 756; but *contra* Ogden *v.* Prentice, *supra*.

[32] McCutchen *v.* McGahay, 11 Johns. 281.

[33] Walker *v.* Laighton, 11 Fost. 111.

[34] Keller *v.* Phillips, 40 Barb. 390.

[35] Debenham *v.* Mellon, 6 App. Cas. 24; Pierpont *v.* Wilson, 49 Conn. 450.

the wife, his liability is clear. So if she voluntarily leaves in just apprehension of personal violence.[36] It was once said that if she left his home because he had placed a profligate woman at the head of his table, he was not liable for necessaries.[37] But this is now denied, and it is held that she may leave, and pledge his credit for necessaries if he renders his house unfit for a modest woman to share it.[38] The husband cannot evade this liability by notice or express prohibition;[39] nor by a request that she shall return;[40] nor by an offer to take her back on improper conditions.[41] If the wife leaves the husband without sufficient cause she cannot bind him.[42] If she leaves without sufficient cause, and returns, and her husband refuses to receive her, she can henceforth bind him if she has not misbehaved in his absence.[43] But if the wife elopes and commits adultery, the husband is not liable for her necessaries,[44] even if he refuses to take her back. But if he again receives her he again becomes liable;[45] but not for necessaries procured during her absence.[46] For the latter (says Mr.

[36] Houliston *v.* Smith, 2 C. & P. 22.
[37] 3 Taunt. 421.
[38] Lidlow *v.* Wilmot, 2 Stark. 77.
[39] Harris *v.* Morris, 4 Esp. 41.
[40] Emery *v.* Emery, 1 You. & Jer. 501.
[41] Reed *v.* Moore, 5 C. & P. 200.
[42] Brown *v.* Midgett, 40 Vt. 68, and 29 *supra*.
[43] Manby *v.* Scott, 1 Sid. 129; Howard *v.* Whetstone, 10 Ohio, 365; McCutchen *v.* McGahay, 11 Johns. 281.
[44] Morris *v.* Martin, 1 Str. 647.
[45] Harris *v.* Morris, 4 Esp. 41; Quincy *v.* Quincy, 10 N. H. 272.
[46] Williams *v.* Prince, 3 Strob. 490; Reese *v.* Chilton, 26 Miss. 598; Oinson *v.* Heritage, 45 Ind. 73; s. c., 15 Am. Rep. 258. If the husband has expelled the wife for adultery at which he connived, he is liable for her necessaries. Wilson *v.* Glossop, 20 Q. B. Div. 354.

Schouler) she is probably herself liable.[47] But this cannot be unless the husband is out of the State or country.[48] A lunatic husband in an asylum is liable;[49] but one in prison is not. If the wife is in the lunatic asylum the husband is liable;[50] but not if she is in prison.[51] If the parties live apart by mutual consent, and the husband regularly pays the wife a reasonable allowance, he is not further liable for necessaries;[52] but he must pay regularly;[53] and so if he pays decreed alimony, although insufficient;[54] and so if he pays an allowance fixed by the wife, although it proves insufficient.[55] If the husband keeps up an appearance of cohabitation by occasional visits, he is *prima facie* liable.[56] In all cases of separation it is incumbent on the claimant to show that it is by consent or the fault of the husband.[57] An infant husband is liable for his wife's necessaries.[58] Mr. Schouler says: "If old enough to

[47] Cox *v.* Kitchin, 1 B. & P. 339.

[48] Hayward *v.* Barker, 52 Vt. 429; s. c., 36 Am. Rep. 762.

[49] Shaw *v.* Thompson, 16 Pick. 198.

[50] Wray *v.* Wray, 33 Ala. 187; Goodale *v.* Lawrence, 88 N. Y. 513; 42 Am. Rep. 259.

[51] Fowler *v.* Dinely, 2 Str. 1122.

[52] Dixon *v.* Harwell, 8 C. & P. 717; Mott *v.* Comstock, 8 Wend. 554.

[53] Beale *v.* Arabin, 36 L. T. (N. S.) 249.

[54] Willson *v.* Smith, 1 B. & Ad. 801; Crittenden *v.* Schermerhorn, 39 Mich. 661; 33 Am. Rep. 440.

[55] Eastland *v.* Burchell, 3 Q. B. D. 432.

[56] Rawlins *v.* Vandyke, 3 Esp. 250.

[57] Thorne *v.* Kathan, 51 Vt. 520. For an excellent summary of the doctrine of the husband's liability for necessaries procured by an absent wife, see Johnston *v.* Sumner, 3 Hurl. & Nor. 261.

[58] Cantine *v.* Phillips, 5 Harring. 428.

contract marriage, an infant is presumed old enough to pay for his wife's board and lodging, as well as his own."

The wife's agency to procure necessaries is always inferred where there is marital cohabitation, although there may not be a valid marriage.[59] It has been said that this is so even if the tradesman knew the association to be illicit.[60] But this has been doubted.[61]

WIFE'S AGENCY OTHER THAN FOR NECESSARIES.

The wife may bind the husband by contracts other than for necessaries, upon an express or an implied agency. She may be appointed by him an attorney by a sealed instrument.[62] An implied agency arises where his employment is such that his wife may be expected to share in it, as farmers, victuallers, or small shop-keepers;[63] or when the husband is absent from home. The wife in the husband's temporary absence has undoubted authority to purchase household necessaries, and may even do so when he is at home, or bind him in a larger scope if it is such as she has usually acted in with his knowledge and assent. But her authority in business matters is special and limited, and if she exceeds it, her hus-

[59] Watson *v.* Threckeld, 2 Esp. 637.

[60] Ibid.

[61] Robinson *v.* Nabon, 1 Camp. 245.

[62] Goodwin *v.* Kelly, 42 Barb. 194.

[63] Webster *v.* McGinnis, 5 Binn. 235; Rotche *v.* Miles, 2 Conn. 638. Compare Felker *v.* Emerson, 16 Vt. 653, with Benjamin *v.* Benjamin, 15 Conn. 347.

band is not bound.[64] Much would depend upon circumstances and the habit of the husband; as for example, the wife of a sailor would have a larger implied authority than the wife of a clergyman.

HUSBAND'S LIABILITY FOR WIFE'S WRONGS.

For all frauds or injuries committed by the wife, before or during coverture, whether to person, property, or character, when made the subject of a civil action, the husband alone is liable to make reparation.[65]

The husband is not punished for the wife's crimes, unless committed by his express or implied direction. As to crimes which are merely *mala prohibita*, if they are committed by the wife in the presence or by the command of her husband, she is not responsible. Where he is present she is presumed to act by his coercion.[66] But it must be actual and not merely constructive presence.[67] This presumption however may be rebutted, and she then becomes responsible; as for example, if she should choke a man while her husband picked his pockets.[68] But the wife is always responsible for her heinous crimes of the order of *mala in se*.

But the husband is not liable for the wife's frauds or injuries, nor can he derive any benefit from those

[64] Goodrich *v.* Tracey, 43 Vt. 314; 5 Am. Rep. 281; Kowing *v.* Manly, 49 N. Y. 192; 10 Am. Rep. 346.

[65] Hawk *v.* Harmon, 5 Binn. 47.

[66] State *v.* Cleaves, 59 Me. 298; 8 Am. Rep. 422.

[67] Seiler *v.* People, 77 N. Y. 411.

[68] People *v.* Wright, 38 Mich. 744; 31 Am. Rep. 331.

committed against her, unless there is a marriage in fact. Mere cohabitation will not suffice.[69] This is different from the rule as to necessaries.

If the fraud or injury by the wife is committed in his presence or by his order, he alone is liable, upon the principle of presumed coercion; otherwise, both are liable, upon the principle of responsibility arising from coverture.[70] So in the former case he is sued alone; in the latter the wife is joined.

The husband's liability for his wife's wrongs ceases with coverture, and the wife alone remains liable where she was joined and survives the husband.[71]

HUSBAND'S REMEDY FOR WRONGS TO WIFE.

For injuries to the wife's person or character, before or after marriage, the husband and wife sue together, at common law.[72] But in an action of damages founded on the prior possession of personal property, the husband sues alone.

At common law the husband not only has a right of action for injuries to his wife's person, but he has a right of action for the loss of her society and his outlay caused thereby, and in the former action there can be no recovery for matters recoverable in the latter; as for example, in an action for assault on the wife, he cannot recover his outlay for a sur-

[69] Overhalt *v.* Ellswell, 1 Ashm. 200.

[70] Angel *v.* Felton, 8 Johns. 149; 2 Kent Com. 149.

[71] Stroop *v.* Swartz, 12 S. & R. 76.

[72] Smalley *v.* Anderson, 2 Mour. 56; Pillow *v.* Bushnell, 5 Barb. 156; Heim *v.* McCaughan, 32 Miss. 17; Cross *v.* Cuthery, 2 Root, 90; Fowler *v.* Frisbie, 3 Conn. 320.

geon's bill, but only for the precise injury to the wife.[73]

The husband has an action for seduction of his wife, which is treated as one of trespass.[74]

Neither husband nor wife can recover at common law for the instantaneous death of the other produced by the negligence of a third.[75] This is generally changed by statute.

[73] Dengate *v.* Gardner, 4 M. & W. 6.

[74] Hoard *v.* Peck, 56 Barb. 202, seems an anomalous case. And in State *v.* Housekeeper, 70 Md. 162, it was held that a husband had no right of action against a surgeon for performing a surgical operation on the wife with her consent.

[75] Green *v.* Hudson R. R. Co., 23 Barb. 9.

CHAPTER III.

THE WIFE'S PROPERTY, AT COMMON LAW.

1. HER PERSONAL PROPERTY. The wife at common law got no interest whatever in her husband's personal property, but by the marriage he acquired the absolute ownership and control of all of hers when once reduced to possession. This extended to her personal property acquired both before and after marriage, and to all her earnings. As to the wife's personalty in possession, his right became absolute instantly upon marriage. This extended to her movables, such as jewels, household goods, cash in hand, and the like. As to her things in action, or property requiring some action to realize its full possession or enjoyment, such as notes, checks, bills, bonds, accounts, rents, profits, legacies, and the like, the husband's right was qualified, and such things did not vest in him until he reduced them to possession. If he failed to do this in his life, they reverted to his widow. The question, what amounts to a reduction to possession, is much debated, but is perhaps best answered by the expression, "realized." Mere possession of the evidences of property will not suffice. There must be a collection or sale of them.[1]

It must be observed that the husband's right ex-

[1] Schoul. Dom. Rel. ch. 5.

tends not to property held by the wife in trust for others.

His right is also subject to an important qualification known as the wife's "equity of settlement." This is thus defined: "If the husband wants the aid of chancery to enable him to get possession of his wife's property, or if her fortune be within the reach of the court, he must do what is equitable, by making a reasonable provision out of it for the maintenance of her and her children."[2] This equity arises only when the husband has to resort to the aid of the court. If third persons, holding the wife's property, choose to deliver it directly to the husband, she gets no equity.[3] The husband cannot evade it by assignment.[4] The equity expires with the wife,[5] and is barred by her adultery.[6] She may however waive it.[7]

[Modern statutes have wrought great changes in the wife's property rights. By recent statutes of New York, which have been adopted with greater or less modifications in many other States, it is provided that the wife is the absolute owner of all her personal property, whether acquired before or after marriage, and to her separate earnings after marriage, free from the interference or control of her husband, and from any liability for his debts, except such as she may contract for the support of herself, or her

[2] 2 Kent Com. 139.
[3] Glaister *v.* Hewer, 8 Ves. 205.
[4] Moore *v.* Moore, 15 B. Mon. 259.
[5] Delagarde *v.* Lempiere, 6 Beav. 344.
[6] Barrow *v.* Barrow, 18 Beav. 529.
[7] Coppedge *v.* Tredgill, 3 Sneed, 577.

children, as his agent. This includes the right to dispose of her property at her pleasure by gift, sale, grant, or will. If, however, she does not so dispose of it during her life or by will, it goes to the surviving husband and children, or to her relatives.[8]]

As to paraphernalia, or the ornaments and wearing apparel of the wife, which she had at marriage, or which come to her from the husband during coverture, they are the husband's property, and he may sell or dispose of them during his life, but he cannot bequeath them away from her, and if they remain after his death they belong to her.[9] He alone can sue for them where he furnished them or they were bought with the joint earnings.[10] [Under the New York statute she may sue for such as were given her by her husband;[11] but in the absence of evidence of a gift to her, if he furnished them he must sue for them.[12]]

2. HER REAL ESTATE.

1. *Leases for years, or chattels real.* — These the husband may appropriate absolutely, by sale, assignment, mortgage, etc. But if he neglects so to appropriate or reduce them to possession, they revert to the wife if she survives him. If he survives her, they vest absolutely in him, like movables, except where the wife was joint-tenant with another, in

[8] Laws 1860, ch. 90; 2 R. S. 96, § 75; Laws 1867, ch. 782, § 79.
[9] Tipping *v.* Tipping, 1 P. Wms. 730.
[10] Hawkins *v.* Railroad, 110 Mass. 596; 20 Am. Rep. 353.
[11] Rawson *v.* Penn. R. Co., 48 N. Y. 212; 8 Am. Rep. 543.
[12] Curtis *v.* Del., etc., R. Co., 74 N. Y. 116; 30 Am. Rep. 271.

which case the other joint-tenant takes to the exclusion of the husband. The wife's right of survivorship may be defeated: —

1. By the act of the husband as above.
2. By his underlease commencing after his death.
3. By his lease for the lives of himself and his wife.
4. By disseverance of the joint-tenancy during coverture.
5. By an executed award of the term to the husband.
6. By the husband's crime, as by attainder.
7. By his alienage.
8. By sale of the chattels on execution by the husband's creditors.

2. *As to her real estate proper.* — By marriage the husband becomes entitled to the use during coverture of all real estate owned by the wife before or coming to her after marriage. He takes all the rents and profits during the joint lives. If living issue is born of the marriage, the husband's interest is extended to his life, whether his wife survives him or not. This is called tenancy by curtesy. The ownership of the real estate continues in the wife and descends to her heirs, subject to these conditions. For an injury to the profits of the wife's real estate the husband may sue in his own name; as for destruction of crops. But for an injury to the inheritance, as for waste, the wife must be joined. The husband after the wife's death may collect all arrears of rent accruing during coverture; not being bound

to reduce them to possession during coverture. Emblements or growing crops go to the husband or his representatives at the termination of his estate. The husband's interest in his wife's real estate can be sold on execution against him for his own debts or those of his wife before marriage. The husband cannot recover for his improvements to her real estate,[13] nor can his creditors reach them.[14] Alienage defeated the acquisition, and attainder effected the forfeiture, of this estate by the husband; and the attainder of the wife worked the same result.

At common law the husband alone had power to bind or alienate the wife's real estate during coverture, or during his tenancy by curtesy. But he could not encumber it beyond his own term, nor defeat the right of survivorship in the wife or her heirs. In a word, he could do no act to prejudice his wife's inheritance.

The husband is not liable for waste.

If the real estate is converted into personalty, by voluntary act of the parties, the proceeds become personalty, and the husband's right attaches as to other personal property. If it is so converted by operation of law, the same effect ensues in New York.[15]

An agreement by the wife to sell her real estate is void, but if she joins her husband in a deed or mortgage, she is bound by the conveyance.[16] But not by

[13] Campion *v.* Colton, 17 Ves. 264; Burleigh *v.* Coffin, 2 Fost. 118.
[14] Lichty *v.* Hager, 13 Penn. St. 565.
[15] Graham *v.* Dickinson, 3 Barb. Ch. 170.
[16] 2 Kent Com. 187.

a warranty in such deed, nor by any of its covenants, although the husband is bound.[17] So she may defeat the title by subsequently acquiring an adverse interest.[18] It may be said generally that the husband's interest in his wife's real estate is bounded by her own interest; as where it is a life estate, or for years, or under a trust, or in joint tenancy with others.

Lands conveyed or devised to husband and wife jointly, are held in tenancy by entirety, and the survivor takes the whole estate.[19]

[The modern married women's acts have radically changed the foregoing rules. Now, taking the New York statutes as the example, the wife is the absolute owner of her real estate, whether acquired before or after marriage, free from any interference or control of her husband, and from any liability for his debts, except such as she may contract for the support of herself and her children as his agent.[20] She may grant, mortgage, lease, sell, or will it, in the same manner as if she were single, and the husband has no interest whatever in it, except that if she dies intestate his tenancy by curtesy attaches as at common law.[21] (This has been denied;[22] but such seems the better opinion.[23]) The wife however can cut off

[17] Ibid. 167; Griner *v.* Butler, 61 Ind. 362; 28 Am. Rep. 675.

[18] Jackson *v.* Vanderheyden, 17 Johns. 167.

[19] Torrey *v.* Torrey, 14 N. Y. 430.

[20] Laws 1860, ch. 90.

[21] Matter of Winne, 2 Lans. 21.

[22] Billings *v.* Baker, 28 Barb. 343.

[23] Burke *v.* Valentine, 52 Barb. 412; Neely *v.* Lancaster, 47 Ark. 175; 58 Am. Rep. 752.

that right by granting or devising her lands. As to tenancy by the entirety, it has been much debated whether the modern statutes have abolished it, and also whether the estate can be sold on execution against the husband. The weight of authority seems to be that the estate still exists.[24]]

Death of the Wife. — On the death of the wife the husband is entitled to administer on her estate.

Although, as we have seen, the husband may, after the wife's death, enforce her choses in action not reduced to possession during her life, yet they are subject to her debts.[25]

Under the English statute of distribution, and generally in this country in the absence of statutes, the husband takes the wife's outstanding personal property, to the exclusion of her children and kindred.[26]

To tenancy by curtesy four things are requisite, namely: marriage, seisin of the wife during coverture, issue born alive, and death of the wife. After such birth, the estate becomes possible, and is then called *initiate*. After the wife's death it becomes complete, and is called *consummate*. The estate is in some States abolished.[27] Generally, actual seisin of the wife during coverture is necessary, and the husband takes no tenancy in the wife's estate in reversion

[24] Hulett *v.* Inlow, 57 Ind. 412; 26 Am. Rep. 64 and note, 65; Bertles *v.* Nunan, 92 N. Y. 152; 44 Am. Rep. 361; Pray *v.* Stebbins, 141 Mass. 219; 55 Am. Rep. 462; Butler *v.* Rosenblath, 42 N. J. Eq. 651; 59 Am. Rep. 52; Baker *v.* Stewart, 40 Kans. 442; Marburg *v.* Cole, 49 Md. 402; 33 Am. Rep. 266.

[25] Heard *v.* Stamford, 3 P. Wms. 409.

[26] 2 Kent Com. 136.

[27] Schoul. Dom. Rel. 164.

or remainder unless the particular estate terminates during coverture.[28]

The husband is bound to bury his wife in a suitable manner at his own expense, even if she had a separate estate.[29]

Death of the Husband.—At common law the widow had a corresponding right of administration. In some States by statute she has the first right. But this right, and her right to a distributive share in his estate, are lost by divorce for the fault of either.[29*]

At common law she took no interest in the husband's personal estate, but this is generally changed by statute.

The widow is entitled to her paraphernalia, consisting of her ornaments and wearing apparel, remaining to her after her husband's death.[30] The husband has the right during his life to appropriate these articles, but unless he does so, they go to the widow on his death. If he has pledged them, she may redeem them on his death, and may recover the redemption money out of his estate next after the claims of his creditors are satisfied.[31]

The husband's estate is primarily liable for the expenses of his burial. Whether the widow, if able, is bound to bury him if he leaves no estate, seems doubtful.[32]

[28] Ferguson *v.* Tweedy, 43 N. Y. 543; Johnson *v.* Jackson, 5 Cow. 74.

[29] Smyley *v.* Reese, 53 Ala. 89; 25 Am. Rep. 598; Darmody's estate, 19 Alb. L. J. 367.

[29*] Matter of Ensign, 103 N. Y. 284.

[30] Schoul. Dom. Rel. 173. [31] Graham *v.* Londonderry, 3 Atk. 393.

[32] Chapple *v.* Cooper, 13 M. & W. 252; McClellan *v.* Filson, 44 Ohio St. 184; 58 Am. Rep. 814.

Dower. — This is the right of the widow to the use and enjoyment, for her life, of one-third of all the real estate in which the husband was seised of an estate of inheritance at any time during the coverture. This estate is superior to curtesy, because it is not dependent on the birth of issue; but inferior, because it extends only to one-third and not to the whole of the rents, income, and profits.

During the husband's life this estate is called *inchoate*. It cannot be divested by any act of the husband, nor by his creditors, even if his estate is insolvent, nor is it barred by his bankruptcy.[32*]

It may be barred or lost by the act of the wife in the following ways: —

1. By jointure, or the conveyance of other lands to the wife and accepted by her in lieu.
2. By her acceptance of a pecuniary provision in lieu. This must be such as she can take and enjoy after his death.[33]
3. By her acceptance of a provision of her husband's will conditioned to be in lieu.
4. By her joining in a deed of the lands with her husband.
5. By absolute divorce for her misconduct.[34]
6. By equitable estoppel.
7. By ante-nuptial agreement.[34*]

[32*] Lazear *v.* Porter, 87 Penn. St. 513; 30 Am. Rep. 380.

[33] Crain *v.* Cavana, 36 Barb. 410; 62 id. 60. And is not liable to abatement. Security Co. *v.* Bryant, 52 Conn. 311; 52 Am. Rep. 599.

[34] Wiseman *v.* Wiseman, 73 Ind. 113; 38 Am. Rep. 113.

[34*] Barth *v.* Lines, 115 Ill. 374; 59 Am. Rep. 374.

Dower does not exist as against a purchase-money mortgage during coverture, nor against a mortgage executed before coverture.

If the wife joins the husband in a deed to release her dower, and the deed is set aside as fraudulent, her right of dower is not barred.[35]

If the wife to release dower joins in her husband's deed and suffers it to be delivered, she cannot avoid it on the ground of fraud or undue influence on the part of the husband, if the grantee was innocent, and the wife was of sufficient mental capacity, and there was no duress or misrepresentation as to the nature of the instrument.[36]

The widow upon the husband's death has quarantine, or the right to remain free in the chief house of the husband forty days, and meantime to have a reasonable sustenance out of his estate.

At common law, as the wife's contracts are utterly void, so a widow's promise to pay her debt contracted during marriage does not bind her.[37]

[35] Molloney *v.* Horan, 49 N. Y. 111; 10 Am. Rep. 335; Ridgway *v.* Matting, 2 Ohio St. 294; 13 Am. Rep. 251; Richardson *v.* Wyman, 62 Me. 280; 16 Am. Rep. 459.

[36] White *v.* Graves, 107 Mass. 325; 9 Am. Rep. 38.

[37] Porterfield *v.* Butler, 47 Miss. 165; 12 Am. Rep. 329; Musick *v.* Dodson, 76 Mo. 624; 43 Am. Rep. 780; Meyer *v.* Haworth, 8 Ad. & Ell. 427. But a written promise by a widow to pay a note given by her during marriage for the benefit of her separate estate is binding. Hubbard *v.* Bugbee, 55 Vt. 506; 45 Am. Rep. 637. Same principle, Sherwin *v.* Sanders, 59 Vt. 499; 59 Am. Rep. 750; Goulding *v.* Davidson, 26 N. Y. 604.

CHAPTER IV.

THE WIFE'S SEPARATE ESTATE, IN EQUITY, AND UNDER THE MODERN STATUTES.

THUS far the wife's property has been considered mainly as affected by the common law. A very different rule has long prevailed in equity, out of which sprang the recent statutes which in many States have given the married woman an independent and equal position in respect to her pecuniary rights.

The principle of the equity courts was this: the wife will be protected in the ownership of her property, whether acquired by contract with her husband before marriage, or by gift from him or a stranger independently of such contract, if duly set apart as her separate estate, even if it must be effected through the agency of her husband as trustee. It is essential that this intent shall be manifested by apt words, indicating the intention to invest her with the *sole* and *separate* use and enjoyment, or clearly excluding the husband from any dominion in or interest over it.[1]

The quality of separate estate ceases with the wife's life, and if the husband survives her he becomes entitled to the property as if it had never been settled to her separate use,[2] unless the terms of

[1] Schoul. Dom. Rel. 189.

[2] Maloney *v.* Kennedy, 10 Sim. 254.

the settlement expressly provide against it. The separate property upon her death is freed from its peculiar incidents, and becomes like any other property of hers remaining on her decease.[3] The husband's tenancy by curtesy will attach unless expressly prohibited.[4]

But the wife may defeat the attaching of the husband's title after death by exercising her power of disposition during her life.[5] She can deal with her separate estate like a single woman unless expressly prohibited by the instrument of settlement.

In England the husband's marital obligations are not changed by the separate settlement. The wife is not bound to maintain the husband nor contribute to the family support out of her separate property.[6] Even if she elopes her separate property will not be charged for the maintenance and education of her children.[7] But after the wife's death her separate estate is a trust for the payment of her debts.[8] In English settlements it is usual to provide against anticipation of the income or infringement upon the capital, and this is regarded as a salutary device "to prevent the wife from bringing ruin upon herself." This provision is imperative before marriage or during widowhood.

[3] Sloper *v.* Cottrell, 6 Ell. & Bl. 501.

[4] Lushington *v.* Sewell, 1 Sim. 548; Carter *v.* Dale, 3 Sea, 710; 31 Am. Rep. 660.

[5] Schoul. Dom. Rel. 194; 20 Alb. L. J. 244.

[6] Lumb *v.* Milnes, 5 Ves. 520.

[7] Hogden *v.* Hogden, 4 Cl. & Fin. 323.

[8] Norton *v.* Turrill, 2 P. Wms. 144.

The doctrine of separate use was adopted at an early day in this country, mainly through the instrumentality of the New York chancellors, Kent and Walworth. The doctrine prevailed in New York, New Jersey, Pennsylvania, Maryland, Virginia, and most of the Southern States, and in Kentucky and Tennessee, but not in the New England and Western States. The power of the wife to deal with her separate property as if unmarried, unless restricted by the deed of settlement, was recognized.[9]

About 1848 a revolution began as to the property rights of married women, and before 1850 Mississippi, New York, New Hampshire, Maine, Vermont, Tennessee, Kentucky, and Michigan had passed important modifying laws, and gradually the march of legislative amelioration has extended to nearly every other State. It is not necessary nor useful here to review these various changes in detail, especially as the laws differ quite essentially; but as New York was one of the earliest, and has been perhaps the most radical in this reform, it will be sufficient and useful to note the present state of the law there, and cursorily refer to the decisions under it and similar laws in other States. The New York law of 1848 was amended in 1849; there was an act of corresponding relief for the husband in 1853; and finally, in 1860, 1862, 1884, and 1887, the revolution was completed, so that, as Mr. Schouler observes, "married women in that State are well nigh emancipated altogether from marital restraints, so far as concerns their property, while the husband's own rights are exceedingly precarious."

[9] Jacques *v.* M. E. Church, 17 Johns. 548.

The substance of these provisions is as follows:—

1. The property, both real and personal, which any married woman now owns as her sole and separate property; that which comes to her by descent, devise, bequest, gift, or grant; that which she acquires by trade, labor, business, or services, carried on or performed on her sole and separate account; that which a woman married there owns at the time of her marriage, and the rents, issues and proceeds of all such property, shall be her sole and separate property, and may be used, collected, and invested by her in her own name, and shall not be subject to the interference or control of her husband, or liable for his debts, except such as may have been contracted by her as his agent for the support of herself and her children. 2. She may bargain, sell, assign and transfer her personal property, and carry on any trade or business, and perform any labor or services on her sole or separate account, and her earnings therefrom shall be her sole and separate property, and may be used or invested by her in her own name. 3. She may bargain, sell and convey her real estate, and contract with reference to the same as if unmarried, and she may bind her separate real estate by her covenant. 4. She may sue and be sued like an unmarried woman in all matters relating to her separate property; she may sue in her own name for damages, or for any injury to her person or character, and the recovery shall be her sole property; and in all such actions she may execute any necessary bond or undertaking as if unmarried, and the same shall

bind her separate estate. 5. No bargain or contract made by her respecting her separate property or business shall bind her husband, unless it relates to property given or granted her by him. 6. In any such action the husband shall not be liable for costs or damages, and a judgment against her shall be enforced out of her separate property. 7. No husband shall bind his child to apprenticeship, or part with its control, or create a guardian for it by will, without the written assent of the mother if living. 8. The husband shall not be liable for his wife's antenuptial debts except to the amount of her separate property acquired by him.

In 1884 a law was passed enabling the wife to contract, except with her husband, as if unmarried. In 1887 a law was passed enabling husband and wife to deed directly to each other.

These acts have not relieved the husband from his common-law liability for his wife's torts.[10] But where husband and wife live upon the wife's separate real estate, the husband, in absence of proof of his personal neglect, is not liable to a third person for an injury occasioned by the condition of that property.[11]

WIFE'S DOMINION OVER HER SEPARATE ESTATE.

1. *In equity.* — As has been said in general terms, the wife's dominion over her separate estate in

[10] Tait *v.* Culbertson, 57 Barb. 9; Fitzgerald *v.* Quann, 109 N. Y. 441; Mangam *v.* Peck, 111 N. Y. 401; Dohorty *v.* Madgett, 58 Vt. 323. *Contra:* Norris *v.* Corkhill, 32 Kans. 409; 49 Am. Rep. 489.

[11] Rowe *v.* Smith, 45 N. Y. 230; Fiske *v.* Bailey, 51 id. 151.

equity was absolute, in respect to the disposal both of the principal and the income, unless she was restricted by the terms of the settlement. This was the earliest English doctrine, from which the courts swerved for a while, but to which they have of late returned.[12] The restrictive intent must have been clearly expressed to be effectual.[13] So the wife might contract with reference to her separate property as if unmarried. This was at one time denied in England,[14] but at length it was admitted that she might charge her separate estate by an instrument under seal;[15] next it was conceded that she might do so by any written instrument, such as her note and the like; and finally it is now admitted in England that she may even charge it by her oral engagement.[16] The engagement need not even expressly charge her estate, but the law will imply the charge.[17] The wife may even so charge her estate for the debt of her husband or another, and even for necessaries.[18] A very recent case thus states the law: "If a married woman, having separate property, enters into a pecuniary engagement, whether by ordering goods or otherwise, which, if she were a

[12] 20 Alb. L. J. 244, 264.

[13] Rich *v.* Cockell, 9 Ves. 369.

[14] Vaughan *v.* Vanderstegen, 2 Drew. 180; Newcomer *v.* Hazzard, 4 Ir. Ch. 274.

[15] Hulme *v.* Tenant, 1 Br. C. C. 16.

[16] Murray *v.* Barker, 3 M. & K. 210; 4 Sim. 82.

[17] Owens *v.* Dickenson, Craig & P. 48; Johnson *v.* Gallagher, 3 DeG. F. & J. 494.

[18] Clerk *v.* Lannice, 2 H. & N. 199; Priest *v.* Cone, 51 Vt. 495; 31 Am. Rep. 695.

feme sole, would constitute her a debtor, and in entering into such engagement she purports to contract not for her husband, but for herself, and on the credit of her separate estate, and it was so intended by her, and so understood by the person with whom she is contracting, that constitutes an obligation for which the person with whom she contracts has the right to make her separate estate liable; and the question whether the obligation was contracted in this manner must depend upon the facts and circumstances of each particular case."[19]

The American doctrine in equity is much the same, except as to engagements as surety for the husband or others.[20]

2. *Under the modern statutes.* — This has been very much discussed and variously decided in this country. The leading case holds that there must be an express charge or appointment in the contract creating the debt, or the debt must be for the benefit of the separate estate.[21] This is now the law of New York, but this doctrine has been reluctantly acquiesced in there, and severely criticised and expressly repudiated in some other States.[22] The best statement of the prevailing rule in New York is the following. "The contract of a married woman may be

[19] Matthewson's case, L. R. 3 Eq. 787; see, also, 20 Alb. L. J. 244, 264.

[20] 20 Alb. L. J. 244, 264; Elliott *v.* Gower, 12 R. I. 79; 34 Am. Rep. 600.

[21] Yale *v.* Dederer, 18 N. Y. 265; 22 id. 451; 68 id. 335.

[22] 20 Alb. L. J. 264; Williams *v.* Urmston, 35 Ohio St. 296; 35 Am. Rep. 611; Pelzer *v.* Campbell, 15 S. C. 581; 40 Am. Rep. 705.

enforced against her separate property, "1st. When created in or about carrying on a trade or business of the wife. 2d. When the contract relates to or is made for the benefit of the separate estate. 3d. When the intention to charge the separate estate is expressed in the instrument or contract by which the liability is created."[23]

When the engagement is as surety for another, the charge need not be by way of mortgage or other instrument creating a specific lien, but, as on the indorsement of a promissory note, is sufficiently effected by the use of words indicating the intention.[24] It need not be evidenced by writing.[25] But where the contract is in writing the charge must be contained in it. And it is not necessary that whether written or oral there should be a specific agreement to charge the separate estate, but the intent may be inferred from the circumstances.[26]

It is not material, where the purpose of the contract was to benefit the separate estate, that actual benefit should accrue. So the wife is liable for the fees of an attorney employed by her husband, when authorized by her to collect rents belonging to her separate estate, although his services were unavailing.[27] But the beneficial purpose must exist. So the wife is not liable to pay for the wedding supper of her daughter, although she ordered it, and after-

[23] Manhattan B. & M. Co. *v.* Thompson, 58 N. Y. 80.
[24] Corn Ex. Bk. *v.* Babcock, 42 N. Y. 613; 1 Am. Rep. 601.
[25] Maxon *v.* Scott, 55 N. Y. 247.
[26] Conlin *v.* Cantrell, 64 N. Y. 217.
[27] Owen *v.* Cawley, 36 N. Y 600.

wards promised to pay for it.[28] Nor is she liable upon a lease, executed by herself and her husband, of a house used as a home for herself and the family, unless she therein expressly charges her separate estate.[29] She is liable to an action of specific performance of her contract to buy land.[30] Her land is liable to a mechanic's lien for a house built on it with her knowledge and silent assent, without any express contract.[31] When she accepts a deed of land, expressly providing that she is to pay an existing mortgage on the land, she is personally liable for its payment, and so she is bound by accepting a deed reserving a lien for the purchase-money.[32] A dedication of a street may be presumed as appurtenant to her deed.[32*]

DEALINGS DIRECT BETWEEN HUSBAND AND WIFE.

The married woman's acts have not removed the disability of husband and wife to contract directly with each other. Now, as formerly, a deed direct from the wife to the husband is void at law.[33] But now, as formerly, a deed direct from husband to

[28] White *v.* Story, 43 Barb. 124.

[29] Eustaphieve *v.* Ketchum, 6 Hun, 621.

[30] Hinckley *v.* Smith, 51 N. Y. 21; Flannery *v.* Rohrmayer, 46 Conn. 558; 33 Am. Rep. 36.

[31] Husted *v.* Mathers, 77 N. Y. 388.

[32] Cashman *v.* Henry, 75 N. Y. 103; 31 Am. Rep. 437; Jackson *v.* Rutledge, 3 Sea. 626; 31 Am. Rep. 655; Brewer *v.* Maurer, 38 Ohio St. 543.

[32*] City of Indianapolis *v.* Kingsbury, 101 Ind. 200; 51 Am. Rep. 749.

[33] White *v.* Wager, 25 N. Y. 328; Winans *v.* Peebles, 32 id. 423.

wife will be supported if there is any equitable reason for it.[34] But an executed sale of personal property by husband to wife is valid.[34*]

Either husband or wife may act as agent the one for the other.[35] The agency need not be created in writing. And where the wife so employs the husband, she may support him out of her business and estate, in spite of his creditors.[36] The husband cannot sue his wife for services.[37] The wife may maintain partition against him;[38] or any equitable action;[39] and an action against her husband's firm for services.[40] She may also maintain ejectment against him, but not so as to prevent his right of occupancy with her.[41] She may maintain an action against him on a note executed by him to her for value during marriage.[42] But no action for a personal tort, as assault.[42*]

[34] Hunt *v.* Johnson, 44 N. Y. 27; 4 Am. Rep. 631; Warlick *v.* White, 86 N. C. 139; 41 Am. Rep. 453; Thompson *v.* Allen, 103 Penn. St. 104; 49 Am. Rep. 116; Furron *v.* Attrey, 21 Neb. 621; 59 Am. Rep. 867.

[34*] Leavitt *v.* Jones, 54 Vt. 423; 41 Am. Rep. 849.

[35] Abbey *v.* Deyo, 44 N. Y. 343; Goodwin *v.* Kelly, 42 Barb. 194.

[36] Buckley *v.* Wells, 33 N. Y. 518. But where she employs him on a salary, his creditors may attach it. Kingman *v.* Frank, 33 Hun, 471.

[37] Perkins *v.* Perkins, 62 Barb. 531.

[38] Moore *v.* Moore, 47 N. Y. 467.

[39] Minier *v.* Minier, 4 Lans. 421.

[40] Adams *v.* Curtis, 4 Lans. 164.

[41] Manning *v.* Manning, 79 N. C. 293; 28 Am. Rep. 344.

[42] May *v.* May, 9 Neb. 16; 31 Am. Rep. 399; Hall *v.* Hall, 52 Tex. 294; 36 Am. Rep. 725; McCampbell *v.* McCampbell, 2 Lea, 661; 31 Am. Rep. 623.

[42*] Schultz *v.* Schultz, 89 N. Y. 644. The husband is not indictable for libelling his wife. State *v.* Edens, 95 N. C. 696; 59 Am. Rep. 294.

The wife cannot carry on a partnership with her husband.[43]

As to the husband's agency, the general rules of agency apply.[43a] The wife is bound by her husband's act when expressly authorized or ratified by her, and when she knowingly accepts the benefit.[44] But she is not liable for improvements made on her property under contract with her husband, in the absence of fraud on her part.[45] She may also employ her husband as contractor.[46] Where she accepts the fruits of a contract made by him as her agent, she is liable in damages for his deceit therein.[47] If she suffers her husband for a long time without objection to receive and appropriate to his own or their joint use the income of her separate estate, she cannot compel him to account for it.[48]

WIFE'S SEPARATE BUSINESS AND EARNINGS.

The wife may contract debts to commence as well as to carry on business.[49] She may carry on business

[43] Kaufman *v.* Schoepel, 37 Hun, 140; Haas *v.* Shaw, 91 Ind. 384; 46 Am. Rep. 607; Bowker *v.* Bradford, 140 Mass. 521; Gwynn *v.* Gwynn, 27 S. C. 525. *Contra:* Graff *v.* Kinney, 37 Hun, 405.

[43a] Hamilton *v.* Hooper, 46 Iowa, 515; 26 Am. Rep. 161; Nash *v.* Mitchell, 71 N. Y. 199; 27 Am. Rep. 38.

[44] Fairbanks *v.* Mothersell, 60 Barb. 406; Graves *v.* Shier, 58 id. 349.

[45] Ainslie *v.* Mead, 3 Lans. 116; Lauer *v.* Bandow, 43 Wis. 556; 28 Am. Rep. 571.

[46] Ibid.

[47] Ibid.

[48] Lyon *v.* Ry. Co., 42 Wis. 538; McLure *v.* Lancaster, 24 S. C. 273; 58 Am. Rep. 259; Warwick *v.* Lawrence, 43 N. J. Eq. 179.

[49] Frecking *v.* Rolland, 53 N. Y. 422.

without a separate estate;[50] but if she has a separate estate but no business she cannot make her separate estate liable for the price of goods except by express charge.[51] If she has neither estate nor business she cannot make herself personally liable.[52] If her business is carried on with her husband she cannot claim the proceeds.[53] To enable the wife to claim her separate earnings there must be an election on her part to do so, and in the absence of such an election, or of circumstances showing her intention to avail herself of her privilege, the husband's common-law right remains.[54] If the wife carries on an unlawful business with his knowledge, he is still liable for the misdemeanor.[55] The wife is not liable during marriage to indictment for a nuisance erected by her husband on her land.[56] She is however civilly liable for the negligence of her servant in her business.[57] If on her sale of her business she covenants not to carry on the same business again,

[50] Foster *v.* Conger, 61 Barb. 145.

[51] Shorter *v.* Nelson, 4 Lans. 114; Wier *v.* Groat, 6 T. & C. 444; Flynn *v.* Messenger, 28 Minn. 208; 41 Am. Rep. 279; Tyemyer *v.* Turnquist, 85 N. Y. 516; 39 Am. Rep. 674. And see Krouskop *v.* Shontz, 51 Wis. 204; 37 Am. Rep. 817.

[52] Robinson *v.* Rivers, 9 Abb. (N. S.) 144.

[53] Boyle's Est., 1 Tuck. 4.

[54] Birkbeck *v.* Ackroyd, 74 N. Y. 356; 30 Am. Rep. 304.

[55] Comrs. of Excise *v.* Keller, 20 How. Pr. 280.

[56] People *v.* Townsend, 3 Hill, 479. And the husband, acting as the wife's agent, is not indictable for a nuisance on her land. People *v.* Crounse, 51 Hun, 489.

[57] Gillies *v.* Lent, 2 Abb. Pr. (N. S.) 455. And for injury by her own negligence in respect to her separate property, as by her cattle straying. Rowe *v.* Smith, 45 N. Y. 230. Even when the husband is trustee. Merrill *v.* City of St. Louis, 82 Mo. 244; 53 Am. Rep. 576.

she is bound thereby.[58] She may recover for services rendered in the family to a third person and to be paid for by him, in pursuance of an agreement with the husband; and even at equity the widow is entitled, as against devisees and distributees of her deceased husband, to money earned by her in a separate business during the marriage, on his agreement that it was to be hers, although he fraudulently reduced it to his own possession.[59]

Crops raised by the wife's money and animals on land leased by the husband are his, and liable for his debts;[60] but otherwise as to crops raised by his labor on her land.[61]

ESTOPPEL.

A married woman suing and managing her separate property is subject to the same equitable estoppels as other persons.[62] But the general rule seems to be that a married woman is not estopped in matters of contract except by her tort or fraud.[63] If she borrows money avowedly for the benefit of

[58] Morgan *v.* Perhamus, 36 Ohio St. 517; 38 Am. Rep. 607.

[59] Mason *v.* Dunbar, 43 Mich. 407; 38 Am. Rep. 201; Reynolds *v.* Robinson, 64 N. Y. 589; Jones *v.* Reid, 12 W. Va. 350; 29 Am. Rep. 455. *Contra:* Bailey *v.* Gardner, 31 W. Va. 94. But she cannot recover unless they are to be paid for by the third person. Coleman *v.* Burr, 93 N. Y. 17; 45 Am. Rep. 160.

[60] Hamilton *v.* Booth, 55 Miss. 60; 30 Am. Rep. 500.

[61] Dayton *v.* Walsh, 47 Wis. 43; 32 Am. Rep. 757.

[62] Anderson *v.* Mather, 44 N. Y. 249; Taddikin *v.* Cantrell, 69 id. 597; 5 Am. Rep. 253.

[63] Note to Shivers *v.* Simmons, 28 Am. Rep. 374; Boyd *v.* Turpin, 94 N. C. 137; 55 Am. Rep. 597; Patterson *v.* Lawrence, 90 Ill. 174; 32 Am. Rep. 22.

a separate estate which she really possesses, her estate is liable for it although the money was not so applied.[64] Prior assent, advice, or authorization by a wife, or passive acquiescence at the time, does not make her liable for her husband's tort in which she does not participate as an actor, and by which neither she nor her estate is benefited.[65] But a wife who on ceasing to do business permits her husband to continue it on her credit may be held as if she still had a separate business.[66] And the husband cannot carry on business in the name and for the benefit of the wife, partly on her credit and by her means, so as to exempt the property from liability for his debts.[67] A woman living under her maiden name, under a void decree of divorce, and acting and representing herself as a single woman, is bound by her acknowledgment of a deed as a single woman.[68] A married woman is bound by her engagement as surety, if she represented that it was for her own benefit.[69] She is estopped by her representation that she is a partner.[70] Even when the firm is represented to consist of her husband and herself.[71]

[64] McVey *v.* Cantrell, 70 N. Y. 295; 26 Am. Rep. 605.

[65] Vanneman *v.* Powers, 56 N. Y. 39.

[66] Bodine *v.* Killeen, 53 N. Y. 93.

[67] Wilder *v.* Abernethy, 54 Ala. 644; 25 Am. Rep. 734.

[68] Reis *v.* Lawrence, 63 Cal. 129; 49 Am. Rep. 83; Hand *v.* Hand, 68 Cal. 135; 58 Am. Rep. 5.

[69] Rogers *v.* Union Cent. Ins. Co., 111 Ind. 343; 60 Am. Rep. 701.

[70] Le Grand *v.* Eufala Nat. Bank, 81 Ala. 123; 60 Am. Rep. 140.

[71] Noel *v.* Kinney, 106 N. Y. 74; 60 Am. Rep. 423.

OTHER CONTRACTS OF WIFE.

The wife is not liable on her own contract for family necessaries unless she agrees so to be, but she may bind herself for them even orally and even if she has no estate. She is bound by her contract in compromise of a claim upon an estate in which she is interested.[72] But she is not liable on her indorsement for a debt of a corporation in which she is a stockholder;[73] nor on her mere subscription to capital stock.[74] Nor by her note, under a statute merely authorizing her to take, hold, and convey property.[75] Nor by her confession of judgment.[76]

[72] Husband *v.* Epling, 81 Ill. 172; 25 Am. Rep. 273.

[73] Russell *v.* People's Sav. Bk., 39 Mich. 671; 33 Am. Rep. 444.

[74] Rice *v.* Railroad Co., 32 Ohio St. 380; 30 Am. Rep. 610.

[75] Stockton *v.* Farsey, 10 W. Va. 171; 27 Am. Rep. 566.

[76] Watkins *v.* Abrahams, 24 N. Y. 72. But see N. Y. Laws of 1884, ch. 381.

CHAPTER V.

WILLS, SETTLEMENTS, AND GIFTS.

AT common law a married woman could not make a valid will. Marriage revoked her will already made,[1] and widowhood did not restore it. But her will may be rendered valid by ante-nuptial agreement to that effect.[1*] Marriage did not revoke the husband's will previously made, but marriage and the birth of a child had that effect.[2] But the wife could make a valid will of personalty with the assent of the husband. And she might dispose of her personal property separately settled upon her by will,[3] unless the settlement denied that power. And so, though long doubted, she might devise her separate real estate.[4] So she might make a will when her husband was civilly dead. Property acquired by her after marriage did not pass by will during marriage.[5]

Under the modern married woman's acts the wife's will made before marriage is not revoked by marriage,[5*] and she may generally make a will as if un-

[1] *In re* Carey, 40 Vt. 236; 24 Am. Rep. 133.

[1*] Osgood *v.* Bliss, 141 Mass. 474; 55 Am. Rep. 488.

[2] Note to Negus *v.* Negus, 26 Am. Rep. 159.

[3] Fettiplace *v.* Gorges, 1 Ves. Jr. 46.

[4] Taylor *v.* Mead, 10 Jur. (N. S.) 127.

[5] Scammell *v.* Wilkinson, 2 East, 556.

[5*] Webb *v.* Jones, 9 Stew. (36 N. J. Eq.) 163; Fellows *v.* Allen, 60 N. H. 439; 49 Am. Rep. 328. *Contra:* Brown *v.* Clark, 77 N. Y. 369.

married. It has been held that this does not authorize a deed to the husband in contemplation of death, where the statute empowers her to devise and convey as if unmarried, but does not remove the common-law disability to take land from him.[6] But the wife certainly can make a will in favor of her husband, and such will is no longer revoked by implication by her second marriage.[7] And so where she has power to make a will as if single.[7*] She may even devise to her husband on condition of his not marrying again.[7†] And her will is not affected by the subsequent birth of issue.[7‡]

ANTE-NUPTIAL SETTLEMENTS.

These are much less in vogue in this country than in England.

A settlement of property by the prospective husband upon the prospective wife, in consideration of her engagement to marry him, is valid.[8]

Such a settlement is valid as against the husband's creditors, even if fraudulent on his part, if the woman was innocent.[9] If the husband is indebted, to the woman's knowledge, a settlement not grossly out of proportion to his station and circumstances

[6] White *v.* Wager, 25 N. Y. 328.

[7] *In re* Tuller, 79 Ill. 99; 22 Am. Rep. 164.

[7*] Noyes *v.* Southworth, 55 Mich. 173; 55 Am. Rep. 359.

[7†] Bostick *v.* Blades, 59 Md. 231; 43 Am. Rep. 548.

[7‡] Cotheal *v.* Cotheal, 40 N. Y. 405.

[8] 2 Kent Com. 165.

[9] Whelan *v.* Whelan, 3 Cow. 537; Nat. Ex. Bk. *v.* Watson, 13 R. I. 78: 40 Am. Rep. 623; Otis *v.* Spencer, 102 Ill. 622; 40 Am. Rep. 617.

is valid.[10] But otherwise if fraudulent on both sides;[11] and so, if there was fraud on the grantor's part, and the woman knew he conveyed his entire estate.[12]

A voluntary conveyance, not expressly in consideration of, but forming an inducement to and followed by marriage, is valid as against creditors of the grantor if not actually fraudulent.[13]

A secret and fraudulent conveyance by a woman, in contemplation of marriage, to third persons, may be avoided by the husband.[14] The same is true of conveyances fraudulently made or procured by the intended husband with design to cut off the wife's dower.[15] But if the husband marry with notice of such settlement by the wife, he is remediless.[16] And the intended husband may make such conveyance to provide for children by a former marriage, although secretly.[16*]

An ante-nuptial agreement that if the wife would take a farm on which she held a mortgage, and the husband would carry it on, she would contribute the products to the support of herself and the family,

[10] Campion *v.* Cotton, 17 Ves. 272.

[11] Columbine *v.* Penhall, 1 Sm. & Giff. 228.

[12] McGowan *v.* Hitt, 16 S. C. 602; 92 Am. Rep. 650.

[13] Whelan *v.* Whelan, 3 Cow. 537.

[14] England *v.* Dowes, 2 Beav. 522; 2 Kent Com. 174; Green *v.* Green, 34 Kans. 740; 55 Am. Rep. 256.

[15] Pierce *v.* Pierce, 71 N. Y. 154; 27 Am. Rep. 22; Butler *v.* Butler, 21 Kans. 521; 30 Am. Rep. 441; Jones *v.* Roberts, 65 Me. 273; Hamilton *v.* Smith, 57 Iowa, 15; 42 Am. Rep. 39.

[16] Cheshire *v.* Payne, 16 B. Mon. 618.

[16*] Champlin *v.* Champlin, R. I. 39 Alb. L. Jour. 321.

having been carried out two years, and the husband having made valuable improvements at his own expense, will be specifically enforced as against the wife and her grantee with notice.[17]

An ante-nuptial settlement is not avoided merely by the wife's subsequent adultery, but a divorce on account thereof annuls such settlement.[18]

The usual form of such settlements is a deed or the like; but the husband's note, in consideration of the marriage promise afterward fulfilled, is binding.[19]

Where such settlement is by a formal instrument, it is strictly construed, and the wife's rights and powers thereunder are bounded by its exact terms.[20]

Where an affianced woman executed her will before marriage, with the oral consent of her intended husband, it was held valid as an ante-nuptial settlement, although revoked as a will by force of the statute.[21]

POST-NUPTIAL SETTLEMENTS.

These are simple gifts of lands or chattels from husband to wife, executed through a third person. They are valid as between the parties, but under some circumstances may be avoided by third persons, such as purchasers and creditors.

A reasonable voluntary deed from husband to wife

[17] Stratton *v.* Stratton, 58 N. H. 473; 42 Am. Rep. 604.
[18] Charrand *v.* Charrand, 1 N. Y. Leg. Obs. 134.
[19] Wright *v.* Wright, 54 N. Y. 437.
[20] Bank of Greensboro *v.* Chambers, 30 Gratt. 202.
[21] Lant's Appeal, 95 Penn. St. 279; 40 Am. Rep. 646.

is valid as against his heirs; certainly when they are not dependent on him for support.[22]

A settlement after marriage, in pursuance of a valid ante-nuptial agreement in writing, is good even as against existing creditors of the grantor; but otherwise if the agreement was not written.[23]

A voluntary conveyance by husband to wife, if the husband was not indebted at the time, is valid as against subsequent creditors.[24] Even if it conveyed all his land and a large proportion of his personalty.[24a] But even then, if the grantor remains in possession, and the transfer is made with a view to procuring future credit on the strength of the apparent ownership, and to a possible failure, it will be void even as against subsequent creditors.[25]

But a voluntary conveyance by husband to wife is valid even as against existing creditors, if the grantor reserves an ample fund for their payment.[26]

As to existing creditors of the husband, his voluntary conveyance is presumptively fraudulent, but the presumption may be rebutted.[27] As to subsequent

[22] Majors *v.* Everton, 89 Ill. 56; 31 Am. Rep. 651; Horder *v.* Horder, 23 Kans. 391; 33 Am. Rep. 167. As to an attempted evasion of an ante-nuptial settlement, see Bussey *v.* McCurley, 61 Md. 436; 48 Am. Rep. 118.

[23] Reade *v.* Livingston, 3 Johns. Ch. 481; Carter *v.* Smith, 82 Ala. 334; 60 Am. Rep. 738.

[24] Phillips *v.* Wooster, 36 N. Y. 412.

[24a] Thompson *v.* Allen, 103 Penn. St. 104; 49 Am. Rep. 116. But not if she is an adulteress or the provision is extravagant. Warlick *v.* White, 84 N. C. 139; 41 Am. Rep. 453.

[25] Savage *v.* Murphy, 34 N. Y. 508; Carr *v.* Phelps, 39 id. 164.

[26] Jackson *v.* Post, 15 Wend. 588.

[27] Seward *v.* Jackson, 8 Cow. 406.

creditors, there must be an actual fraudulent intent on the part of the grantor to avoid the conveyance.[28] Where such intent exists the grantee's innocence will not avail.[29]

Presents of chattels by the husband to the wife may be held by her as against his creditors, where they were bought for her, and brought into the house and recognized as hers.[30] A gift of chattels from husband to wife is valid where the claims of creditors do not intervene.[31] But his voluntary note to her is not good as against his heirs.[32] Yet the note of a third person, upon a consideration moving from the husband, and by him given to the wife, is valid as a gift.[33] If he takes for a debt due to him a note payable to himself and his wife, it is presumed to be intended as a gift to her if she survives him, but he may defeat this right by will.[34]

Whether a note executed by a husband to his wife living separate from him to induce her to return, is enforceable, is variously decided.[35]

A settlement on the wife in consideration of her release of her inchoate right of dower is valid as against creditors unless grossly excessive, and then void only as to the excess.[36]

[28] Loeschigk *v.* Hatfield, 5 Robt. 26.
[29] Mohawk Bank *v.* Atwater, 2 Pai. 54.
[30] Reed *v.* Gannon, 50 N. Y. 345.
[31] Mack *v.* Mack, 3 Hun, 323.
[32] Whitaker *v.* Whitaker, 52 N. Y. 368.
[33] Reed *v.* Reed, 52 N. Y. 651.
[34] Pile *v.* Pile, 6 Lea. 508; 40 Am. Rep. 50.
[35] Phillips *v.* Meyers, 82 Ill. 67; 25 Am. Rep. 295; Copeland *v.* Boaz, 9 Baxt. 223; 40 Am. Rep. 39.
[36] Collins *v.* Dawley, 4 Col. 138; 34 Am. Rep. 72.

A post-nuptial contract between husband and wife to renounce their mutual rights of property is void.[36*]

Many States by statute permit the wife to have the benefit of an insurance on the husband's life as against his creditors, although he pays the premiums, and the wife may pledge it as security for his debt.[37]

CONSTRUCTIVE FRAUD.

It must be observed that a conveyance or gift by a woman to her husband or intended husband is presumed to be fraudulent and void as to her, and will not be sustained except upon clear proof of the strictest good faith on the part of the grantee. This doctrine is founded on the presumed influence and dominion of the husband. It is the same although the conveyance is apparently for value.[38]

[36*] Newby *v.* Cox, 81 Ky. 58.

[37] Burwell's Exr. *v.* Lumsden, 24 Gratt. 443; 18 Am. Rep. 648.

[38] Darlington's Appeal, 86 Penn. St. 512; 27 Am. Rep. 726; Pierce *v.* Pierce, 71 N. Y. 154; 27 Am. Rep. 22, and note, 26; Gilmore *v.* Burch, 7 Or. 374; 33 Am. Rep. 710.

CHAPTER VI.

SEPARATION AND DIVORCE.

THE law is opposed to voluntary separation of husband and wife, and regards an agreement therefor as illegal.[1] A settlement by way of separate maintenance on such a separation is void.[2] But equity has come to recognize deeds of separation so far as they concern the rights of third parties,[3] and will enforce specific performance so far as their provisions are not contrary to law or public policy.[4] Such deeds are not uncommon in England, but are infrequent in this country. They seem not to be recognized generally in New England,[5] and they are discarded in North Carolina.[6] In Massachusetts, although a contract for future separation is void, yet when a husband agrees to pay a trustee a sum of money for the support of his wife in contemplation of an immediate separation which takes place, this is valid.[5] It is also there held that a contract for the support of the wife made after separation is valid.[7] An executed agreement for separation is a valid de-

[1] 2 Kent Com. 177.
[2] St. John *v.* St. John, 11 Ves. 530.
[3] Wilson *v.* Wilson, 1 H. of L. Cas. 538.
[4] Vansittart *v.* Vansittart, 2 DeG. & J. 249.
[5] Albee *v.* Wyman, 10 Gray, 222.
[6] Collins *v.* Collins, 1 Phill. N. C. Eq. 153.
[7] Fox *v.* Davis, 113 Mass. 255; 18 Am. Rep. 476.

fence to an action for divorce for acts of cruelty committed before the agreement;[8] but otherwise as to an action for divorce for impotency.[9] An agreement for separation and maintenance pending an action for absolute divorce is valid.[9*]

Where the wife is abandoned by the husband, and he leaves the State, the law recognizes her right to earn, contract, sue, and be sued, like a single woman; but not unless he has left the State.[10]

The law recognizes three kinds of divorces: —

1. Divorces on the ground of the nullity of the marriage contract.
2. Divorces dissolving the marriage contract, called absolute divorces or divorces *a vinculo.*
3. Divorces from bed and board, *a mensa et thoro*, called limited divorces.

These are regulated in all communities by statute, and these statutes differ so radically that it is impossible to review them in an elementary work, or to do more than point out a few general principles everywhere recognized.

1. *Nullity of contract.* — For this divorce there are generally five causes: lack of legal age, former marriage, lack of mental capacity, force or fraud, and impotence. These matters have been somewhat re-

[8] Squires *v.* Squires, 53 Vt. 208; 38 Am. Rep. 668.

[9] J. G. *v.* H. G., 33 Md. 401; 3 Am. Rep. 183.

[9*] Pettit *v.* Pettit, 107 N. Y. 677.

[10] Abbott *v.* Bayley, 6 Pick. 89; Hayward *v.* Barker, 52 Vt. 429; 36 Am. Rep. 762.

marked upon in the opening chapter. It may now be said generally, that marriages coming within these prohibitions are usually valid until pronounced void, and the children are legitimate.[11] It has been held, however, that a judgment annulling a marriage contracted by an insane party is unnecessary.[12] The lack of mental capacity and the impotence to justify a divorce must have existed at the time of the marriage.[12]

A marriage procured by fraud can be avoided only by the person defrauded.[11]

2. *Dissolution of the contract.* — The main and universally recognized cause for this is adultery. In England a divorce for this cause is denied to the wife unless accompanied by cruel treatment. But a divorce for this cause will never be granted where the offence was committed by the procurement or connivance[12*] of the complainant; or has been forgiven and the parties have voluntarily cohabited with knowledge of its commission, which is called Condonation; or the complainant has also been guilty of the like offence, so that the defendant, if innocent, might have a divorce therefor, which is called Recrimination.

Adultery pending suit is also a bar.

[11] Tompert's Exrs. *v.* Tompert, 13 Bush, 326; 26 Am. Rep. 197; Birdzell *v.* Birdzell, 33 Kans. 433; 52 Am. Rep. 539.

[12] Powell *v.* Powell, 18 Kans. 371; 29 Am. Rep. 774; Insanity, 17 Alb. L. J. 220.

[12*] See a doubtful decision as to connivance, Robbins *v.* Robbins, 140 Mass. 528; 54 Am. Rep. 488.

Condonation is a conditional forgiveness; repetition revives the injury.[13]

Recrimination is a valid defence in all actions for divorce.[14]

Generally the defendant on judgment passing against him is prohibited from remarrying during the plaintiff's life. But this provision has no extra-territorial effect.[15] It is held that a marriage within this State in violation of this injunction subjects the prohibited party to the penalties of bigamy.[16]

3. *From bed and board.* — The common law did not allow this divorce to the husband.[17] It may be granted for a limited time or forever.

The causes differ very greatly in different communities, but the following, recognized in New York, are probably universal: —

1. Cruel and inhuman treatment.
2. Such conduct as renders it unsafe and improper to cohabit.
3. Abandonment and refusal or neglect to provide.

1. *Cruel and inhuman treatment.* — This must be such as renders the life or health of the plaintiff unsafe.[18] Words of menace creating a reasonable

[13] Smith *v.* Smith, 4 Pai. 432; Sewall *v.* Sewall, 122 Mass. 156; 23 Am. Rep. 299.

[14] Hale *v.* Hale, 47 Tex. 336; 26 Am. Rep. 294.

[15] Van Voorhis *v.* Brintnall, 86 N. Y. 18; 40 Am. Rep. 505.

[16] People *v.* Faber, 92 N. Y. 146; 44 Am. Rep. 357.

[17] Van Veghten *v.* Van Veghten, 4 Johns. Ch. 501.

[18] Perry *v.* Perry, 2 Pai. 501; Wheeler *v.* Wheeler, 53 Iowa, 511; 36 Am. Rep. 240.

apprehension of bodily violence will suffice.[19] It need not be personal; unmercifully whipping her child in the wife's presence and in spite of her entreaties will suffice.[20] But mere bad temper, or conduct producing annoyance, discontent, and disgust, is not enough.[21] Nor does mere intoxication, occasional or frequent, constitute "cruel or inhuman treatment."[22] Nor an angry expulsion of the wife under suspicion of infidelity.[23] Nor refusal to permit her to attend her own church.[24]

A single cruel act does not constitute "cruelty of treatment."[25] But when accompanied by circumstances indicative of a probability of repetition, it may warrant a divorce.[26] But not unless it threatens life or affects health.[27] A single false accusation of unchastity warrants a divorce for cruelty.[27*]

Recrimination in kind, but only when in kind, is a defence.[28] Cohabitation does not condone cruelty.[28*]

[19] Whispell *v.* Whispell, 4 Barb. 217; Davies *v.* Davies, 55 id. 130.

[20] Bihin *v.* Bihin, 17 Abb. Pr. 19.

[21] Conklin *v.* Conklin, 17 Abb. Pr. 20.

[22] Mason *v.* Mason, 1 Edw. 278.

[23] Barlow *v.* Barlow, 2 Abb. Pr. (N. S.) 259.

[24] Lawrence *v.* Lawrence, 3 Pai. 267. See W. *v.* W., 141 Mass. 495; 55 Am. Rep. 491.

[25] Hoshall *v.* Hoshall, 51 Md. 72; 34 Am. Rep. 298.

[26] Beyer *v.* Beyer, 50 Wis. 254; 36 Am. Rep. 848; Palmer *v.* Palmer, 45 Mich. 150; 40 Am. Rep. 461.

[27] See note to last case, 40 Am. Rep. 463.

[27*] Bahn *v.* Bahn, 62 Tex. 518; 50 Am. Rep. 539; Avery *v.* Avery, 33 Kans. 1; 52 Am. Rep. 523; Albert *v.* Albert, 5 Mont. 577; 51 Am. Rep. 86; Friend *v.* Friend, 53 Mich. 543; Kelly *v.* Kelly, 18 Nev. 49; 51 Am. Rep. 742.

[28] Hopper *v.* Hopper, 11 Pai. 46; Terhune *v.* Terhune, 40 How. Pr. 258.

[28*] Reynolds *v.* Reynolds, 3 Keyes, 368.

2. *Such conduct as renders it unsafe and improper to cohabit.* — "Unsafe" means a reasonable apprehension of bodily injury.[29] As subjecting the wife to excessive sexual intercourse.[30]

3. *Abandonment and refusal or neglect to provide.* —These must concur.[31] The neglect must be wilful.[32] Denial of sexual intercourse is not "utter desertion";[32*] nor "desertion" nor "cruelty."[32†] On a suit by a husband for separation for abandonment, the wife may be awarded a separation for cruelty.[32‡]

Alimony.—Pending the suit the court may grant the wife a pecuniary provision from the husband to enable her to live separately from him, which is called alimony; and also compel him to pay her counsel fees to enable her to wage or defend the suit. On granting her a divorce the court may also impose alimony, and order the husband to make provision for supporting the children. If the wife remarries, the court may revoke or reduce her alimony, it not appearing that the new husband is not able to support her.[33]

The court may also grant alimony although no divorce is sought.[33*] The application must be made before judgment.[33]

[29] Mason *v.* Mason, 1 Edw. 278.
[30] Melvin *v.* Melvin, 58 N. H. 569; 42 Am. Rep. 605.
[31] Ahrensfeldt *v.* Ahrensfeldt, Hoffm. 47.
[32] Skean *v.* Skean, 6 Stew. 149.
[32*] Stewart *v.* Stewart, 78 Me. 548; 57 Am. Rep. 822.
[32†] Segelbaum *v.* Segelbaum, 39 Minn. 258.
[32‡] Waltermire *v.* Waltermire, 110 N. Y. 183.
[33] Stillman *v.* Stillman, 99 Ill. 196; 39 Am. Rep. 21.
[33*] Graves *v.* Graves, 36 Iowa, 310; 14 Am. Rep. 405.
[33†] Beadleston *v.* Beadleston, 103 N. Y.

FOREIGN DIVORCES.

A divorce obtained by the husband against the wife, who was not within the jurisdiction, nor personally served with process, and did not appear, is void.[34] The same is true of a divorce so obtained against the husband.[35] Even when there was an appearance, but unauthorized.[36] The record of such a judgment may always be impeached by proof of the facts.[37] A divorce rendered in a State where neither of the parties lived at the time is void;[38] and a State statute authorizing divorces to non-residents who desire to become residents is void.[39] But a divorce in another State, against an absent wife, who was a resident of that State, upon substituted service of process in accordance with the laws of that State, is valid elsewhere.[40] But a wife confined by the husband in an insane asylum in another State is not absent so as to warrant constructive service, and even a domestic decree rendered on such service in such case may be collaterally impeached.[41]

[34] Borden *v.* Fitch, 15 Johns. 121; People *v.* Baker, 76 N. Y. 78; 32 Am. Rep. 274.

[35] Bradshaw *v.* Heuth, 13 Wend. 407.

[36] Kerr *v.* Kerr, 41 N. Y. 272.

[37] Hoffman *v.* Hoffman, 46 N. Y. 30; 7 Am. Rep. 299.

[38] Hood *v.* State, 56 Ind. 263; 26 Am. Rep. 21; Gettys *v.* Gettys, 3 Lea, 260; 31 Am. Rep. 637; Sitowich *v.* Sitowich, 19 Kans. 451; 27 Am. Rep. 145.

[39] Hood *v.* State, *supra;* Van Fossen *v.* State, 37 Ohio St. 317; 41 Am. Rep. 507.

[40] Hunt *v.* Hunt, 72 N. Y. 217; 28 Am. Rep. 129.

[41] Newcomb's Exrs. *v.* Newcomb, 13 Bush, 544; 26 Am. Rep. 222. See, also, Bradford *v.* Abend, 89 Ill. 78; 31 Am. Rep. 67.

Divorce is always measured by the law of domicile.[42]

EFFECT AND INCIDENTS OF DIVORCE.

Absolute divorce, as we have seen, bars dower, but it does not annul a provision by will in favor of either party.[43] Limited divorce with provision for payment of a gross sum in discharge of liability for future support does not bar dower.[43*] But where both are allowed to remarry, a decree in favor of the wife, with provision for permanent alimony, bars dower.[43†] A woman to whom has been granted a separation may acknowledge a deed of her own land as if single.[43‡] A divorced woman can recover for services rendered by her to her former husband before the marriage;[44] but not for a tort during the marriage.[45] The court may always provide for the custody of the children. The adequacy of alimony cannot be collaterally attacked by a stranger.[45*] Alimony for life subsists even after defendant's death.[45†]

[42] Harvey *v.* Farnie, 6 P. Div. 35; Sottomayor *v.* De Barros, 3 P. Div. 1; 5 id. 94.

[43] Charlton *v.* Miller, 27 Ohio St. 298; 22 Am. Rep. 307; Card *v.* Alexander, 48 Conn. 492; 40 Am. Rep. 187; *Re* Boddington, Ch. Div., Jan., 1883.

[43*] Taylor *v.* Taylor, 93 N. C. 418; 53 Am. Rep. 460.

[43†] Tatro *v.* Tatro, 18 Neb. 395; 53 Am. Rep. 820.

[43‡] Delafield *v.* Brady, 108 N. Y. 524.

[44] Carlton *v.* Carlton, 72 Me. 115; 39 Am. Rep. 307.

[45] Abbott *v.* Abbott, 67 Me. 304; 24 Am. Rep. 27; Libby *v.* Berry, 74 Me. 286.

[45*] Hare *v.* Gibson, 32 Ohio St. 33; 30 Am. Rep. 568.

[45†] Stratton *v.* Stratton, 77 Me. 373; 52 Am. Rep. 779.

Divorce for fault of either destroys wife's right to administer on or share in his estate.[45‡]

ANNULLING DIVORCE.

A decree of divorce may be vacated for fraud.[46] Although the rights of innocent third parties are thereby prejudiced.[47] But not by strangers to the record, as infant children of divorced parents.[48] Annulling the decree puts the parties *in statu quo*, without regard to subsequent marriage and birth of children, or agreement of parties;[49] and where the decree was granted in another State, the annulling will be presumed valid.[49]

[45‡] Matter of Ensign's Estate, 103 N. Y. 284; 57 Am. Rep. 717.
[46] Edson *v.* Edson, 108 Mass. 590; 11 Am. Rep. 393.
[47] Rush *v.* Rush, 46 Iowa, 648; 26 Am. Rep. 179.
[48] Baugh *v.* Baugh, 37 Mich. 59; 26 Am. Rep. 495.
[49] Comstock *v.* Adams, 23 Kans. 513; 33 Am. Rep. 191.

CHAPTER VII.

PARENT AND CHILD.

CHILDREN are of two classes: legitimate and illegitimate. A legitimate child is one begotten or born in wedlock. An illegitimate child is one begotten and born out of wedlock.

The legal presumption is that a child born during wedlock is legitimate. But this presumption may be rebutted. The common-law rule was that a child born during wedlock was legitimate if the husband was within the four seas and not impotent. But this has been modified, and now it is generally held that proof of non-access of the husband establishes illegitimacy, and this is a question of fact. Legitimacy is favored in law, and illegitimacy can be established only by clear proof.[1]

At the civil law subsequent marriage legitimated issue previously born, and this is the law of a number of our States, but not of England nor New York.

Parliament may legitimate illegitimate children, and so may our legislatures unless restrained by constitutional provision.

The domicile of a child's origin is determined by that of his father. As a general rule the ques-

[1] Hargrave *v.* Hargrave, 9 Beav. 552; Patterson *v.* Gaines, 6 How. 582.

tion of legitimacy is governed by the law of the domicile of the child's origin. One born a bastard is not rendered legitimate in England by the subsequent marriage of his parents in a country where such subsequent marriage legitimates. And a person illegitimate by the law of the domicile of his birth is held illegitimate in England.[1*]

Adoption was not recognized at common law, but is recognized by statute in a few States.

DUTIES OF PARENTS.

There are three: 1. To protect; 2. To educate; 3. To maintain.

1. *Protection.* — This duty will justify a parent in upholding a child in his law-suits, and committing an assault and battery in his defence.

2. *Education.* — This is generally a moral rather than a legal duty. In New York there is a system of compulsory education, but it is practically a dead-letter. In England the question of education frequently arises under the father's will. In the absence of any direction the child is to be educated in the father's religion. The religious education of an infant of fifteen will not be changed unless he desires it, but no regard is paid to the wishes of one of ten. The father may direct the plan of education to be pursued after his death. The English court of chancery exercised a direction of the education of minor wards. With this our

[1*] See Greenhow *v.* James's Exrs., 80 Va. 636; 56 Am. Rep. 603.

courts have little to do. The duty of educating does not extend to a trade or profession.[2]

3. *Maintenance.* — The father is bound to support his minor child. It would seem that this is an obligation imposed by nature, but it has been held that at common law it does not exist.[3] By statute, 43 Eliz., generally regarded as a part of our own law, the parents of blind, lame, and impotent persons were bound to maintain them, but this obligation extends only to necessaries. This is also generally the statutory rule in this country.

The father at common law is indictable for exposure or neglect of his children, and one who wilfully suffers his little child to starve to death commits murder; but when children grow up they are presumed to provide for their own urgent wants.[4] And a father is not criminally liable for mere neglect to call a physician for his child.[5]

The father is not bound to support the child in idleness if the child is able to work.

The step-father is not bound to support his step-child unless he practically adopts him by taking him into his family and providing for him.[6]

In a state of voluntary separation the husband and not the wife is *prima facie* bound for the support of children living with the wife.[7] But

[2] Turner *v.* Gaither, 82 N. C. 357; 35 Am. Rep. 574.
[3] Kelly *v.* Davis, 49 N. H. 176; 6 Am. Rep. 499.
[4] Johnson *v.* State, 2 Humph. 283.
[5] Queen *v.* Morby, 8 Q. B. Div. 571.
[6] Smith *v.* Rogers, 24 Kans. 140; 36 Am. Rep. 254.
[7] Kimball *v.* Keyes, 11 Wend. 33.

this is not so where there is a divorce, even for the husband's fault, and an award of children to the mother imposes the duty of support on her beyond alimony.[8]

Although the father is generally bound to maintain the children whatever their circumstances, yet if he is unable, and they have property of their own, the court will order it applied to their maintenance.[9] This will be done where the father is unable to support the child according to its fortune and expectations.[10] Frequently this is allowed where, although the father is not destitute, yet the children are better off.[11] The father may even be allowed out of the estate for past maintenance.[12]

After the father's death the mother is bound to support the child if able.[13] But if the child has property that will be applied without regard to the mother's ability.[14] If the father is living but unable, and the child has property, the mother will not be taxed except when necessary.[14]

[8] Burritt *v.* Burritt, 29 Barb. 124; Husband *v.* Husband, 67 Ind. 583; 33 Am. Rep. 107. But if there is no decree for custody, and the wife supports the children, she may recover from the husband therefor. Gilley *v.* Gilley, 79 Me. 292; 1 Am. St. Rep. 307. And so, where she was awarded the custody, but there was no provision for the child's support. Pretzinger *v.* Pretzinger, 45 Ohio St. 452; 4 Am. St. Rep. 542.

[9] 2 Kent Com. 191.

[10] Buckworth *v.* Buckworth, 1 Cox, 80; Matter of Kane, 2 Barb. Ch. 375.

[11] 2 Kent Com. 191; Harring *v.* Coles, 2 Bradf. 249.

[12] Matter of Burke, 4 Sandf. Ch. 619.

[13] Dedham *v.* Natick, 16 Mass. 140.

[14] Halley *v.* Bannister, 4 Mad. 275. And she may be allowed for support of the child out of its estate. Pierce *v.* Pierce, 64 Wis. 72; 54 Am. Rep. 581.

As a general rule the capital of the child's property will not be infringed for his support except when absolutely necessary.[15]

Agency of Child. — The father is not bound by the contracts or for the debts of his child, even for necessaries, except upon actual or implied authority.[16]

If the infant resides at home, and is there properly supported by his father, a third person cannot furnish him necessaries so as to bind the father, without express authority.[17] But if the father fails in this duty, so that the child is obliged to leave home, it has been held that he may bind him for necessaries.[17] In such case the authorities differ as to whether the liability rests upon an implied authority or moral obligation. But this seems generally a dispute over words, for the slightest evidence will sustain a finding of authority by implication. As where the father knows the circumstances, and makes no objection.[18] And having been made liable once, he may be again in the same circumstances.[19] As where he has paid former similar bills.[20] But in the absence of any such circumstances the moral obligation will not raise the liability.[21]

[15] Barlow *v.* Grant, 1 Vern. 255. [16] 2 Kent Com. 192.

[17] Clinton *v.* Rowland, 24 Barb. 634. Although the third person was ignorant that he was already supplied. Baines *v.* Toye, 13 Q. B. Div. 410; 41 L. T. Rep. (N. S.) 292.

[18] Thayer *v.* White, 12 Met. 343; Dalton *v.* Gib, 5 Bing. (N. C.) 198.

[19] Platts *v.* Rosebury, 4 Dutch. 146.

[20] Bryan *v.* Jackson, 4 Conn. 288.

[21] Kelly *v.* Davis, 49 N. H. 176; 6 Am. Rep. 499; Holt *v.* Baldwin, 46 Mo. 265; 2 Am. Rep. 515; Freeman *v.* Robinson, 38 N. J. 383; 20 Am. Rep. 399, and note 403.

The child after majority is presumed to furnish his own necessaries, and a mere request from the father to furnish them, though the son is still living with him, does not bind the father.[22]

Where the child is absent from home, the person furnishing necessaries to the child must ascertain at his peril whether the child is warrantably absent,[23] and must take notice at his peril of what is necessary according to the child's situation.[24]

RIGHTS OF PARENTS.

The law gives to parents the custody, control, and services of their minor children, to aid the fulfilment of their obligations toward them and to compensate them therefor.

1. *Correction.*—Very ancient laws gave to the father the power of life and death over his children. The common law gives only a moderate degree of authority, relaxing as the child grows older. The father may correct the child in a reasonable manner,[24*] but for cruel punishment he is liable to indictment, and may even be found guilty of manslaughter or murder where death ensues. One standing *in loco parentis* has the same right of correction.[25]

[22] Boyd *v.* Sappington, 4 Watts, 247.

[23] Raymond *v.* Loyd, 10 Barb. 483.

[24] Van Valkenburgh *v.* Watson, 13 Johns. 480.

[24*] It has been held that he is not indictable for a cruel chastisement unless malicious and permanently injurious. State *v.* Jones, 95 N. C. 588; 59 Am. Rep. 282. See note, 59 Am. Rep. 286.

[25] Snowden *v.* State, 12 Tex. App. 105; 41 Am. Rep. 667.

2. *Custody.* — At common law the father has the paramount right to the care, custody, maintenance, and nurture of the minor child.[26] The mother has little or no authority. The father may appoint a testamentary guardian; but in case of the father's death without the exercise of this power, the mother succeeds to these rights.

But courts of equity established a different rule, and gave these rights to the mother where the father was unfit or unable, as when he was an outlaw and resided abroad, or was living in adultery,[27] or encouraged his children in bad habits, or if they could not associate with him without moral contamination or being shunned by others.[28] Mere adultery on the father's part was not regarded unless the child was brought into contact with the paramour.[29] Atheism, blasphemy, and irreligion have been accounted sufficient to warrant the court in depriving the father of the custody of the child. So, where the father was intemperate, vicious, and coarse, the court refused to take a child of nine from his maternal grandfather and give him to the father.[30]

But mere poverty or insolvency will not suffice, even if another offers ample security for the child's support;[31] but otherwise if the father has acquiesced for a time.[32]

[26] People *v.* Mercein, 3 Hill, 399.
[27] Wellesley *v.* Beaufort, 2 Russ. 1.
[28] Anon., 2 Sim. (N. S.) 54.
[29] Ball *v.* Ball, 2 Sim. 85.
[30] *In re* Goldsworthy, L. R. 2 Q. B. D. 75.
[31] *Ex parte* Hopkins, 3 P. Wms. 152.
[32] Blake *v.* Leigh, Amb. 307.

The English common law was ameliorated in 1839 by Justice Talfourd's act, which made the father's right of custody dependent on his performance of his parental duty and on the interests of the child.

In America the father has the paramount right of custody in the absence of statutes to the contrary,[33] but it may be forfeited by misconduct. As for refusal to provide proper medical attendance.[34] The welfare of the child is the paramount consideration.[35] In a word, it is in the discretion of the court to change the custody of the infant, as between the parents. But generally a stranger may not interfere.[36]

The wishes of the child will be consulted if he is of years of discretion, but not otherwise. Nine or ten years has been considered too young, but sometimes less than fourteen will answer.

In England it has been held that a father may revoke an agreement to surrender the custody of the child.[37] The general doctrine seems to be against permanent transfer, except upon apprenticeship or legal adoption. But where a child has been given up at birth to third persons, especially relatives, who have for a period of years supported it with the acquiescence of the parents, the court may refuse in

[33] People *v.* Humphreys, 24 Barb. 321.

[34] Heinemann's Appeal, 96 Penn. St. 112; 42 Am. Rep. 532.

[35] Case of Waldron, 13 Johns. 418; McKim *v.* McKim, 12 R. I. 462; 34 Am. Rep. 694; English *v.* English, 22 Alb. L. J. 243; Drummond *v.* Ashton, 22 Alb. L. J. 183; Matter of Bort, 25 Kans. 308; 37 Am. Rep. 255; Sturtevant *v.* State, 15 Neb. 459; 48 Am. Rep. 349.

[36] Schoul. Dom. Rel. 340.

[37] Reg. *v.* Smith, 16 E. L. & Eq. 221.

the interest of the child to award the custody to the parents.[38]

At common law the father may not divest himself of his right by contract with the mother.[39] And it seems that the father cannot give away the child so as to bar the mother's right to its custody on the father's death, even where the custody had been changed for ten years, the child preferred to remain, and the mother was poor.[40]

Where the custody of the child has been given by the parents to a third person, he may maintain an action against one unlawfully taking it away, without proving any loss of service.[41]

The widow loses the right of custody by remarriage.[42]

The usual remedy to obtain the custody is *habeas corpus*, but this only lies when the child is restrained of his liberty.[43]

3. *Services and earnings.* — The father has the right to the child's services and earnings until its majority. But not where he refuses or neglects to

[38] Pool *v.* Gott, 14 Law Reporter, 269; Matter of Murphy, 12 How. Pr. 513; but see Wilcox *v.* Wilcox, 14 N. Y. 575; Bentley *v.* Terry, 59 Ga. 555; 27 Am. Rep. 399; Chapsky *v.* Wood, 26 Kans. 650; 40 Am. Rep. 321; Bonnett *v.* Bonnett, 61 Iowa, 198; 47 Am. Rep. 810; Matter of Scarritt, 76 Mo. 565; 43 Am. Rep. 768; Jones *v.* Darnell, 103 Ind. 569; 53 Am. Rep. 545; Merritt *v.* Swimley, 82 Va. 433; 3 Am. St. Rep. 115.

[39] Torrington *v.* Norwich, 21 Conn. 543.

[40] Moore *v.* Christian, 56 Miss. 408; 31 Am. Rep. 375.

[41] Clark *v.* Bayer, 32 Ohio St. 299; 30 Am. Rep. 593.

[42] Williams *v.* Hutchinson, 5 Barb. 122.

[43] *In re* Poole, 2 McA. 583; 29 Am. Rep. 628.

support the child, or compels him to support himself. The right of action for a minor's services is presumed to be in the father.[44]

But the father may voluntarily relinquish this right to the child. This is called Emancipation. The agreement may be express, or implied from circumstances.[45] The father may do this although insolvent.[46] In such case payment by a third person of the minor's wages to him is valid.

But where the child has not been emancipated the father may forfeit his right to recover his wages from a third by delay and acquiescence in payment to the child.[47] No secret arrangement between father and child can justify payment to the minor.[48]

The father may bind himself that a third may have the services of his minor child for any specified time during minority, for a compensation to the father and the support and education of the child.[49]

If a minor absconds and serves one who supports him, the father cannot recover his wages without allowing for his support.[50] An emancipated minor stands on the footing of a stranger as to employment by his father.[51]

[44] Shute *v.* Dorr, 5 Wend. 204.

[45] Burlingame *v.* Burlingame, 7 Cow. 92.

[46] Atwood *v.* Holcomb, 39 Conn. 270; 12 Am. Rep. 386; Wilson *v.* McMillan, 62 Ga. 16; 35 Am. Rep. 115; Wambold *v.* Vick, 23 Alb. L. J. 97.

[47] Smith *v.* Smith, 30 Conn. 111.

[48] Kauffelt *v.* Moderwell, 21 Penn. St. 222.

[49] Van Dorn *v.* Young, 13 Barb. 286.

[50] Hunton *v.* Hazelton, 20 N. H. 388.

[51] Hall *v.* Hall, 44 N. H. 293.

A widow is entitled to the earnings and services of her minor child, unless he is emancipated or has a guardian.[52] But not after remarriage.[53]

The right to services and earnings ceases with the attaining of majority. After majority, if the child continues with the parents, the family relation is presumed to continue, and the child cannot recover for services to the parent, unless there was an agreement therefor.[54]

The right does not extend to step-children.[55] Where the step-father voluntarily assumes their care and support, he stands *in loco parentis*, and he cannot recover for their support nor can they for their services.[56]

THE CHILD'S PROPERTY.

The father has no right in the child's separate personal or real estate.

Clothing furnished by the father to the child belongs to the father, and he may maintain suit for injury thereof.[57] But not so when he gives him money for general purposes, and the child buys

[52] Simpson *v.* Buck, 5 Lans. 337; Hammond *v.* Corbett, 50 N. H. 501; 9 Am. Rep. 288; Matthewson *v.* Perry, 37 Conn. 435; 9 Am. Rep. 339; Furman *v.* Van Sise, 56 N. Y. 435; 15 Am. Rep. 441.

[53] Hollingsworth *v.* Swedenborg, 49 Ind. 378; 19 Am. Rep. 687; Williams *v.* Hutchinson, 5 Barb. 122.

[54] Dye *v.* Kerr, 15 Barb. 444; Green *v.* Roberts, 47 Barb. 521; Houck *v.* Houck, 99 Penn. St. 552.

[55] Tubb *v.* Harrison, 4 T. R. 18.

[56] Smith *v.* Rogers, 24 Kans. 140; 36 Am. Rep. 254; Gerdes *v.* Weiser, 54 Iowa, 591; 37 Am. Rep. 239.

[57] Prentice *v.* Decker, 49 Barb. 21.

clothing with it.[58] Gifts from father to child may be revoked.[59]

All conveyances and gifts by a child to a parent before or shortly after majority are presumptively void, and only supported by proof of absolute good faith. But this does not apply as to grandfather and grandchild.[60]

PARENT'S ACTION FOR INJURY TO CHILD.

The parent has a right of action for expenses and loss of the child's services caused by the negligence or wrong of another. The action is founded on the loss of service. So in England, if the child is so young as to be incapable of performing any service, the action would not lie,[61] and it is doubted whether in such case the action for expenses would lie.[62] But the rule is otherwise in this country,[63] at least as to expenses.[64] After the father's death, the mother may maintain the action.[64*]

The right of the parent is not defeated by the fact that the child is living with and in the service of another;[65] but it is otherwise if the parent has relinquished all right to the child's service.[66]

[58] Dickinson *v.* Winchester, 4 Cush. 114.
[59] Cranz *v.* Kroger, 22 Ill. 74.
[60] Cowee *v.* Cornell, 75 N. Y. 91; 31 Am. Rep. 426.
[61] Hall *v.* Hollander, 4 B. & C. 660.
[62] Grinnell *v.* Wells, 8 Scott, N. R. 741.
[63] Hartfield *v.* Roper, 21 Wend. 615.
[64] Dennis *v.* Clark, 2 Cush. 347.
[64*] County Commrs. *v.* Hamilton, 60 Md. 340; 45 Am. Rep. 739.
[65] Wilt *v.* Vickers, 8 Watts, 227.
[66] Arnold *v.* Norton, 25 Conn. 92.

The recovery may extend to prospective loss of service.[67] But not to prospective medical outlay.[67*]

The parent has no right of action for injury resulting in the instantaneous death of the child, but if the child lingers and finally dies, he may recover for intermediate loss of service.[68]

The parent's negligence always defeats his own action.[69]

The father, or after his death the mother, has a right of action for enticing away or abducting the child.[70] But the mere employment of a runaway child is not enticement,[71] unless done with knowledge of his absconding, and with intent to aid and encourage him in staying away.[72] No action lies for enticing the child into a marriage against the parent's consent.[73]

The theory of this action is reimbursement for loss of service, not compensation for wrong to the child.

In an action for seduction of a daughter the principle is the same.[74] Injury to the daughter will not suffice. But the service lost need only be slight,

[67] Drew *v.* Sixth Ave. R. R. Co., 26 N. Y. 49.

[67*] Cuming *v.* Brooklyn City R. Co., 109 N. Y. 95.

[68] Green *v.* H. R. R. Co., 2 Keyes, 294; Plummer *v.* Webb, Ware, 380; Edgar *v.* Castello, 14 S. C. 20; 37 Am. Rep. 714.

[69] Smith *v.* Hestonville R. Co., 92 Penn. St. 450; 37 Am. Rep. 705.

[70] Lumley *v.* Gye, 2 Ell. & Bl. 224; Sargent *v.* Matthewson, 38 N. H. 54; Jones *v.* Tevis, 4 Litt. 25; Plummer *v.* Webb, Ware, 380.

[71] Butterfield *v.* Ashley, 6 Cush. 249.

[72] Everett *v.* Sherfey, 1 Iowa, 256.

[73] Hervey *v.* Mosely, 7 Gray, 249.

[74] Bartley *v.* Richtmeyer, 4 Comst. 38; Blagge *v.* Ilsley, 127 Mass. 191; 34 Am. Rep. 361; Ogborn *v.* Francis, 45 N. J. 441; 43 Am. Rep. 394.

as making tea or milking cows. Whatever the service, the parent must have a genuine right to it. So if the child was out at service at the time, the father cannot maintain the action, but otherwise if he had a right to recall her at any time. So where the child was in the service of another, but by permission came home to render slight assistance from time to time, the action does not lie;[75] but otherwise if the visits home were in the bargain by the father's requirement.[76] Mere temporary absence on a visit constitutes no impediment to the action.[77] Where the girl was dismissed from service, and was seduced on her way home, the action was held to lie.[78] Hiring the girl on purpose to seduce her does not defeat the action.[79] The action lies after the daughter is of age, if the relation of master and servant exists;[80] but not when the daughter is working for herself;[81] nor where, although under age, she was at the head of her own house, and the father was visiting with her.[82]

The mother has a right of action for the seduction of the minor daughter effected after the father's death, if the daughter was actually in her service. So when the father has been absent unheard of for

[75] Thompson *v.* Ross, 5 H. & N. 16.

[76] Kennedy *v.* Shea, 110 Mass. 147; 14 Am. Rep. 584.

[77] Griffiths *v.* Teetgen, 15 C. B. 344; Sutton *v.* Hoffman, 32 N. J. 58.

[78] Terry *v.* Hutchinson, 3 Q. B. 599.

[79] Dain *v.* Wyckoff, 18 N. Y. 45.

[80] Stevenson *v.* Belknap, 6 Iowa, 97.

[81] George *v.* Van Horn, 9 Barb. 523.

[82] Manley *v.* Field, 7 C. B. (N. S.) 96.

seven years.[83] And so when the daughter was out at service, but came home and assisted her mother a few days, becoming then pregnant by defendant, and afterwards returned to service.[84] But not so when the daughter was at service, and was seduced while on a visit to her mother, and confined while in service of another employer.[85] It has even been held that her action will lie even if the seduction occurred while the daughter was out at service, but this does not obtain in England and some of our States.[86]

The action of seduction may be maintained by any one standing in the parent's place.

Although the ground of the action of seduction is loss of service, yet the damages are not restricted to the loss of those services, but may embrace distress of mind and loss of society.[87]

In other actions the recovery is limited to loss of services and expenses.[88]

LIABILITY FOR CHILD'S TORTS.

The parent is not liable for his child's torts,[89] although committed in his presence but without his approval.[90] Not even if he did not subsequently

[83] Davidson *v.* Abbott, 52 Vt. 570; 36 Am. Rep. 567.
[84] Gray *v.* Durland, 51 N. Y. 424.
[85] Hedges *v.* Tagg, L. R. 7 Ex. 283.
[86] Furman *v.* Van Sise, 56 N. Y. 435; 15 Am. Rep. 441.
[87] Irwin *v.* Dearman, 11 East, 23; Bedford *v.* McKowl, 3 Esp. 120.
[88] Cowden *v.* Wright, 24 Wend. 429.
[89] Baker *v.* Haldeman, 24 Mo. 219.
[90] Tifft *v.* Tifft, 4 Den. 175. *Contra:* Strohl *v.* Levan, 39 Penn. St. 177.

disapprove, as a malicious prosecution.[91] But he is liable for the child's negligence in his service.[91*] And for injury by the child's negligent acts which he knows of and permits on his premises.[91†]

DUTIES OF CHILDREN.

The child owes honor and obedience to his parents. At common law he is not bound to support his parents.[92] But this is generally changed by statute. For necessaries furnished his parents at his request he is liable,[93] and he is liable to contribute for necessaries furnished by other children at his request.[94]

RIGHTS OF CHILDREN.

These have been already considered to some extent under Duties of Parents. But to particularize:

Emancipation. — This gives the child the right to his own time and wages, and the control of his own person, and discharges the parent from obligation to support, unless the child becomes unable to support himself. It may be in writing or by parol; for the whole minority or a shorter term; gratuitous or for

[91] Moon *v.* Towers, 8 C. B. (N. S.) 611.

[91*] Teagarden *v.* McLaughlin, 86 Ind. 476; 44 Am. Rep. 332; Schaeffer *v.* Osterbrink, 67 Wis. 495; 58 Am. Rep. 875.

[91†] Hoverson *v.* Noker, 60 Wis. 511; 50 Am. Rep. 381, and note, 383. But not for merely allowing the child to have a pistol. Hagerty *v.* Powers, 66 Cal. 368; 56 Am. Rep. 101.

[92] Edwards *v.* Davis, 16 Johns. 281.

[93] Lebanon *v.* Griffin, 45 N. H. 558.

[94] Stone *v.* Stone, 32 Conn. 142.

a valuable consideration. It requires the child's assent. If gratuitous and by parol, it is revocable until acted upon.[95] Emancipation is always presumed in cases of necessity, as where the father expels the child,[96] abandons him to his mother,[97] or leaves him to shift for himself, refusing or neglecting to provide for him. Slight circumstances will sustain a finding of emancipation, although not implying misconduct on the father's part.[98] It may take place although the child continues at home.[99] Marriage with parental consent emancipates,[100] but not so where it is without consent.[101] The child's earnings after emancipation cannot be recovered by the father,[102] although he has notified the employer not to pay the child.[103] Nor can the father's creditors attach them,[102] although he is insolvent.[103] After emancipation the father may deal with the child as a stranger;[104] but it has been said that as to creditors he can only relinquish the right to the child's services, and may not also pay him therefor.[105] The fact that the father received the earnings or the

[95] Abbott *v.* Converse, 4 Allen, 530.
[96] Clinton *v.* York, 26 Me. 167.
[97] Wodell *v.* Coggeshall, 2 Met. 89.
[98] Campbell *v.* Campbell, 3 Stockt. 268.
[99] McCloskey *v.* Cyphert, 27 Penn. St. 220.
[100] Taunton *v.* Plymouth, 15 Mass. 203; Aldrich *v.* Bennett, 63 N. H. 415; 56 Am. Rep. 529.
[101] White *v.* Henry, 24 Me. 531. *Contra:* Aldrich *v.* Bennett, *supra.*
[102] Bray *v.* Wheeler, 29 Vt. 514.
[103] Chase *v.* Elkins, 2 Vt. 290.
[103] See note 46, *supra.*
[104] See note 51, *supra*; Suckman *v.* Wood, 25 Cal. 147.
[105] Note, 35 Am. Rep. 121.

fruits thereof does not revoke or annul the emancipation.[106] The father's duty to support the child revives if the child becomes unable to support himself.[107] Emancipation is not presumed where the child leaves home without consent, the father being able and willing to provide for him.[108]

After Majority. — If the child continues with the parent, the family relation is presumed to continue, and the child cannot recover for services to the parent without proof of an agreement or understanding for compensation.[109] But circumstances showing an unusual burden assumed by the child, or special advantages reaped by the father, are sometimes construed in the child's favor.[110] Where an adult child occupies the parents' real estate, an agreement to pay rent is presumed, but is easily rebutted.[111]

Voluntary Conveyances. — The rules concerning gifts and voluntary conveyances to children are much the same as in the case of husband and wife. If a son purchases and stocks a farm as a home for a poor father, who works it, the products are not subject to attachment as the son's property.[112] If the parent permits the child to receive and invest his earnings they belong to the child.[113]

Constructive Fraud. — As has been said, a benefit

[106] Jenny *v.* Alden, 12 Mass. 375
[107] Clark *v.* Fitch, 2 Wend. 463.
[108] Angell *v.* McLellan, 16 Mass. 28.
[109] Lipe *v.* Eisenlerd, 32 N. Y. 229.
[110] House *v.* House, 6 Ind. 60.
[111] Oakes *v.* Oakes, 16 Ill. 106
[112] Brown *v.* Scott, 7 Vt. 57.
[113] Campbell *v.* Campbell, 3 Stockt. 268.

from child to parent in or near minority is jealously and suspiciously regarded, on account of the presumed influence and control. Not so of a benefit from parent to child, in the absence of proof of inequality, undue influence, or fraud.[114]

Advancements. — In England large sums of money and valuable chattels and real estate delivered and conveyed by the parent to the child are reckoned as advancements, to be deducted from the child's distributive share in the parent's estate, unless shown to be gifts.[115] Not so of small sums for ornaments, education, and the like.[116] In this country generally nothing is reckoned as an advancement unless proved to have been so intended at the time,[117] and that intention cannot afterwards be changed without the child's consent. Money *et cetera* given to a son-in-law is not presumed an advancement.[118] The amount of an insurance on the father's life for the benefit of the child, and the premiums paid by him therefor, have been held an advancement.[119] The subject is regulated by statute in some States.

The child may sell his expectancy,[120] but whether he may release it to his parent is doubted.[121]

[114] Jenkins *v.* Pye, 12 Pet. 253; Cowee *v.* Cornell, 75 N. Y. 91; 31 Am. Rep. 428.

[115] Smith *v* Smith, 3 Gif. 263.

[116] Miller's Appeal, 40 Penn. St. 57.

[117] Osgood *v.* Breede's Heirs, 17 Mass. 356.

[118] *Ex parte* Oakey, 1 Brad. 281; McClure *v.* Evans, 29 Beav. 422; Rains *v.* Hays, 6 Lea, 303; 40 Am. Rep. 39.

[119] Rickenbacker *v.* Zimmerman, 10 S. C. 110; 30 Am. Rep. 37.

[120] Curtis *v.* Curtis, 40 Me. 24.

[121] Robinson *v.* Robinson, Brayt. 59.

ILLEGITIMATE CHILDREN.

At common law a bastard has very few rights. He is *nullius filius*. He is incapable of being heir to any one. He can have no heirs save of his own body. He has no name except from reputation.

In this country the general rule is that he and his mother can mutually inherit. Under our laws the father can be compelled to support his illegitimate child, but there was no such liability at common law. The father is not bound to support his bastard child if the mother during pregnancy marries another who knows her condition.[121*] A voluntary promise by father to mother to support the bastard is invalid.[121†]

The mother is its natural guardian, bound to support it, and entitled to its custody as against the father.[122]

An illegitimate child may take by purchase if sufficiently described, and in this country generally by will. Even a devise to an unborn illegitimate child in being is good.[123] A voluntary settlement in favor of an illegitimate child has been upheld and enforced.[124]

[121*] Miller *v.* Anderson, 43 Ohio St. 473; 54 Am. Rep. 823.

[121†] Mercer *v.* Mercer's Admr., Ky., 37 Alb. L. J. 367.

[122] Robalina *v.* Armstrong, 15 Barb. 247; Queen *v.* Nash, 10 Q. B. Div. 454.

[123] Kuye *v.* Moore, 1 Sim. & Stu. 61.

[124] Gardner *v.* Heyer, 2 Pai. 11.

CHAPTER VIII.

GUARDIAN AND WARD.

A GUARDIAN is a person entrusted with the interests of a minor, whose youth and inexperience disqualify him from acting for himself, and who is called the ward.

Guardians at common law are of three kinds: by nature, by nurture, and by socage. Testamentary guardians were created by statute.

Guardians by nature and by nurture are really the same in character and powers. They are always the parents; first the father, and on his death the mother. The office of natural guardian lasted through minority; that by nurture ceased at fourteen. This authority extended only to person, and not to property.

Guardianship by socage arose when an infant under fourteen acquired title to real estate, and was designed to protect it. This guardian took possession of the heir's person and real estate, and received the rents and profits until the infant became fourteen. The office belonged without appointment to the next of kin incapable of inheriting from the ward. This guardianship has become disused.

A testamentary guardian was one appointed by the father's last will, who took the ward's person

and entire estate from every source. This guardianship was created by statute of Charles II. It was unknown to the common law.

In addition there was the chancery guardian appointed by the equity court whenever an infant was brought by suit into that court, but generally only where he had property.

In this country this subject is generally regulated by statute. The right of appointing a testamentary guardian is generally recognized and limited to the father.

APPOINTMENT.

Guardians are appointed either by the parent or a court.

1. *By the parent.* — Generally the father has first right, and on his death without appointment the mother may appoint. A grandfather cannot appoint.[1]

The appointment must be in writing, generally by deed or will. But where a father, shortly before death, committed and surrendered his children to a charitable institution, pursuant to its charter, by a witnessed writing, it was held a good appointment, although neither a deed or will.[2]

Neither a firm nor a mere corporation can be guardian.[3]

[1] Hoyt *v.* Tilton, 2 Edw. 202.
[2] People *v.* Kearney, 31 Barb. 430.
[3] De Mazar *v.* Pybus, 4 Ves. 644.

2. *By the court.* — Generally, on arriving at the age of fourteen, the infant, if there is no guardian by deed or will, or such guardian declines or is disqualified, may have his guardian appointed by the court. This appointment is regulated by statutes and rules. This guardian is called the general guardian. The father will usually be appointed, in the absence of any valid objection, but relatives or strangers may be appointed. The wishes of deceased parents may be consulted. The infant's own preference will have weight, but will not be conclusive. The appointment is always within the discretion of the court, and will be made for the infant's best interests.

Guardianship how terminated. — Guardianship is terminated by the majority, death, or marriage of the ward; by death, resignation, or removal of the guardian; or if the guardian is a woman, by her marriage; or by the expiration of the term of one appointed by deed or will for a period short of minority.

Marriage of the ward terminates the power of the guardian over the person of the ward of either sex. As to property, the guardian of a male ward retains his power notwithstanding the marriage; but as to a female ward, under the modern married woman's acts, it is variously held.[4] Where wards intermarry, it is a question whether the wife's guardian retains his control of her property,

[4] Brick's Estate, 15 Abb. Pr. 12; Matter of Herbeck, 16 Abb. Pr. (N. S.) 214.

or it goes to the husband, and consequently under the power of his guardian. But at all events an order of court is necessary to transfer the wife's estate.[5]

On death of a guardian another may be appointed, or the survivor, if any, named by deed or will, will succeed. If two or more were appointed, the survivors will succeed.

Natural guardians and guardians in socage cannot resign, nor generally guardians by will.[7] Probably all guardians who have once accepted must serve until released by the court.

Any guardian may be removed for abuse of his trust. Some statutes add incompetency, and removal or intent to remove from the State. Natural guardians and guardians in socage are simply superseded. The main causes for removal generally are: appointment without due notice; gross and confirmed intoxication; any official misconduct; abandonment of the trust; ignorance, or imprudence, or waste; imprisonment for crime; bankruptcy. But mere insolvency will not suffice.[8]

At common law, marriage of a female guardian terminates the guardianship, and transfers it to the husband. If marriage does not put an end to her authority under the modern married woman's acts, it probably couples the husband in the trust.

[5] Whitaker's Case, 4 Johns. Ch. 378.
[6] People *v.* Byron, 3 Johns. Cas. 53.
[7] *Ex parte* Crumb, 2 Johns. Ch. 439.
[8] Chew's Estate, 4 Md. Ch. 60; Cooper's Case, 2 Pai. 34.

RIGHTS AND DUTIES OF GUARDIAN.

These relate to person and estate.

1. *Rights as to Person.* — The guardian is entitled to the custody of the ward's person subject to the regulation of the court. Where a person other than the parent is appointed, his right is superior even to that of the parent, for ordinarily the parent is appointed unless unfit.[9] But access will be granted to the parents under proper restrictions. The guardian may change the domicile of the ward within the State,[10] or without;[11] but an improper removal of the ward from the State may be restrained by the court.[12] If however the guardian is the parent, he may exercise the power of removal unrestricted.[13] The guardian may recover the person of the ward from one unlawfully detaining him.[14] He may select the place of the ward's education. He may bind his ward to apprenticeship. He may warn away and forcibly expel improper associates.[15]

The guardian is not entitled to his ward's services. Consequently he cannot maintain an action for seduction of his female ward.[16]

[9] Senseman's Appeal, 21 Penn. St. 331.

[10] *Ex parte* Bartlett, 4 Bradf. 221.

[11] 2 Kent Com. 227.

[12] Wilcox *v.* Wilcox, 14 N. Y. 575.

[13] Pottinger *v.* Wightman, 3 Mer. 67; Holyoke *v.* Haskins, 5 Pick. 20.

[14] *Ex parte* Dawson, 3 Bradf. 130.

[15] Wood *v.* Gale, 10 N. H. 247.

[16] Blanchard *v.* Ilsley, 120 Mass. 487; 21 Am. Rep. 535. But *contra*, Fernsler *v.* Moyer, 3 W. & S. 416.

2. *Duties as to Person.* — These are protection, education, and maintenance.[16*]

The guardian is bound to maintain the ward only from the ward's own estate. In supplying his wants he must consult his income. If necessary he may place him at work, or, if he is too young and feeble, may entrust him to some charitable institution.[16†]

Ordinarily, therefore, the guardian will not be personally liable for the ward's maintenance, but he may make himself liable by contract express or implied, as by failure to limit the right of indemnity to the estate in his hands.[17]

No guardian may expend more than the income of his ward's estate without consent of the court, except in case of imperative and sudden necessity; but the court may afterwards ratify his doing so.[18]

The order of expenditure is, first, the interest or income; next, the principal of personalty; and last, the real estate; but the latter can never be sold except by order of the court and for the purpose of maintenance.[19]

But capital will never be encroached upon except in case of necessity, as sickness, inability to labor, or to finish education. The guardian may, however,

[16*] The guardian is liable in damages for his neglect to clothe the ward. Nelson *v.* Johansen, 18 Neb. 180; 53 Am. Rep. 806.

[16†] As to when the guardian will be reimbursed for support. *In re* Besondy, 32 Minn. 385; note, 57 Am. Dec. 223; State *v.* Slevin, 93 Mo. 253; 3 Am. Rep. 526.

[17] Hutchinson *v.* Hutchinson, 19 Vt. 437.

[18] *In re* Bostwick, 4 Johns. Ch. 100.

[19] Strong *v.* Moe, 8 Allen, 125.

anticipate income to supply a casual deficiency,[20] or treat an increase of value as income,[21] or use accumulated profits when necessary. He has a large discretion in expenditure not encroaching on the capital,[22] and he may resort to the income of the entire property wherever situated.[23]

The father, when guardian, may not use his child's income or principal except by authority of the court, being ordinarily bound himself to support the child.

The guardian is presumed to furnish necessaries, and a stranger furnishing them must generally contract with the guardian.[24] But the party furnishing is not bound to see that payment is made from the ward's income; that is the guardian's risk.[25]

RIGHTS OF FOREIGN GUARDIAN AS TO PERSON.

In England, the claim of a foreign guardian to the ward's person is not regarded, but a guardian will there be appointed.[26] Recently, however, a foreign guardian whose ward was being educated in England was allowed to remove him to his own country.[27] But the paternal right of removal is there recognized, and this is so in this country.[28] But in the Ameri-

[20] Bybee *v.* Tharp, 4 B. Mon. 313.
[21] Long *v.* Norcom, 2 Ired. Eq. 354.
[22] Brown *v.* Mullins, 24 Miss. 204.
[23] Foreman *v.* Murray, 7 Leigh, 412.
[24] State *v.* Cook, 12 Ired. 67.
[25] Broadus *v.* Rosson, 3 Leigh, 12.
[26] *Ex parte* Watkins, 2 Ves. Sr. 470.
[27] Nugent *v.* Vetzera, L. R. 2 Eq. 704.
[28] Townsend *v.* Kendall, 4 Minn. 412.

can States the rights and powers of guardians are regarded as strictly local.[29]

RIGHTS AND DUTIES OF GUARDIAN AS TO WARD'S ESTATE.

There are two leading principles: —

1. Unauthorized acts of the guardian will be sanctioned if they are beneficial to the ward, but if detrimental, the guardian alone must suffer.

2. The guardian is not permitted to reap any personal benefit from the use of the ward's estate, nor from any bargain or transaction relating to it.

The guardian must receive, collect, invest, and generally manage the ward's estate, pay the necessary expenses of his ward's protection, education, and support, and account for his trust.[29*]

He may lease,[30] and may discharge a mortgage.[31] He may sue for debts,[32] compromise, release, or submit to arbitration.[33] If he imprudently brings an unsuccessful suit, he is personally to bear the costs. He may compromise a suit and release a debt, but not imprudently or fraudulently. He cannot release a benefit to which his ward is entitled by decree.[34]

[29] Morrell *v.* Dickey, 1 Johns. Ch. 153.

[29*] Taking a note payable to a former guardian individually, as part of the estate, he does it at his own risk. State *v.* Greensdale, 106 Ind. 364; 55 Am. Rep. 753.

[30] Emerson *v.* Spicer, 46 N. Y. 594.

[31] Chapman *v.* Tibbitts, 33 N. Y. 289.

[32] Smith *v.* Bean, 8 N. H. 15.

[33] Weed *v.* Ellis, 3 Cai. 253.

[34] Hite *v.* Hite, 2 Rand. 409.

He cannot by general contract bind his ward's estate,[35] nor avoid a beneficial contract made by his ward.[36] He is personally bound by his own contract for his ward, even for necessaries,[37] but not for his ward's own breach of contract.[38] And the guardian is entitled to reimbursement out of the ward's estate for all contracts fairly made, and for all necessary expenditures. His promise to pay his ward's debt is valid, although not in writing.[39]

Although he has no right to purchase the ward's property, yet such purchase is not absolutely void, but the ward may affirm it at majority.[40] He may not even in good faith sell his own property to his ward, and the ward may recover the purchase price paid.[40*]

He must not apply exempt property to his ward's debts. He must not mingle his ward's money with his own, nor invest it in his own business;[41] but if he lends his ward's money and his own to the same person upon the same security, acting in good faith and with due care, he is not liable for loss.[42]

He is not liable for unfortunate investments carefully made, nor for moneys lost by robbery without his fault. Yet he is liable for moneys robbed unless

[35] Jones *v.* Brewer, 1 Pick. 317; Rollins *v.* Marsh, 128 Mass. 116.
[36] Oliver *v.* Houdlet, 13 Mass. 237.
[37] Simms *v.* Norris, 5 Ala. 42; Rollins *v.* Marsh, 128 Mass. 116.
[38] Velde *v.* Severing, 2 Rawle, 269.
[39] Roche *v.* Chaplin, 1 Bailey, 419.
[40] Bostwick *v.* Atkins, 3 N. Y. 53.
[40*] Hendee *v.* Cleveland, 54 Vt. 142.
[41] State *ex rel. v.* Sanders, 62 Ind. 562; 30 Am. Rep. 203.
[42] Barney *v.* Parsons, 54 Vt. 623; 41 Am. Rep. 858; Lamar *v.* Micou, 104 U. S. 465; State *v.* Slevin, 93 Mo. 253; 3 Am. St. Rep. 526.

he takes pains to recover them.[43] And for fraud or negligence he is liable, and so for loss by ignorance of his duty. But he is liable to account only for property accessible to him.

Innocent third parties are not affected by his fraud. Others will be held as trustees. But if they neglect to make reasonable inquiries they will be liable for loss by their imprudence.[44] So if a legacy charged on land and payable at majority is paid before to the guardian, the land will be liable until the ward actually receives the money.[45] One who takes the ward's property in payment of the guardian's debt, knowing the trust, must refund to the ward unless the guardian accounts.[46]

Where a guardian buys land for himself, upon his own credit and in his own name, and afterwards uses his ward's money to pay for it, his ward gets no resulting trust in the land.[47]

As to Real Estate. — The guardian may lease the land, execute deeds when judicially authorized, collect and sue for rent, and bring ejectment and trespass. He is personally liable for neglect herein, and for occupancy of the land himself, or for suffering the land to remain unoccupied. He may lease for a term longer than his trust, and such a lease is only void at his ward's election at majority.[48] He may

[43] Matter of Jackson, 1 Tucker, 71.
[44] Gale *v.* Wells, 12 Barb. 84.
[45] Cate *v.* Gentry, 28 Ga. 327.
[46] McDuffie *v.* McIntyre, 11 S. C. 551; 32 Am. Rep. 500.
[47] French *v.* Sheplor, 83 Ind. 266; 43 Am. Rep. 67.
[48] Putnam *v.* Ritchie, 6 Pai. 390.

hire land. He may grant an easement or license, institute partition, assign dower. He should repair, but must not make improvements without authority of the court. He should keep the buildings insured.

As to Personal Estate. — The guardian should reduce it to possession.[48*] Money should be deposited in bank, to his account as guardian, until invested. If he deposits to his own account he is liable for its loss. He has a reasonable time to collect debts and demands. He must contest all improper claims. He must not suffer his ward's money to remain idle, but may keep on hand a reasonable amount for expenses. Testamentary guardians should follow the directions of the will for investment, and in so doing are not liable for loss. Investments generally must be made upon real estate security or in public stocks, but small sums may be deposited in savings banks. For loss upon investments made on other security the guardian is personally liable. When the guardian unreasonably neglects to invest he is liable for interest, and, in cases of misconduct, for compound interest. If he speculates with the trust fund, he is liable for the profits and compound interest. If he loses the ward's money by a usurious loan, he is liable for principal and interest.

In general, the guardian, if he has acted in good faith and according to his best judgment, will not be

[48*] He may not convert personalty into realty without the previous sanction of the court. Boisseau *v.* Boisseau, 79 Va. 73; 52 Am. Rep. 516.

strictly held for losses, although he did not exercise all the promptitude and skill which the occasion demanded.

Suits. — Generally the guardian must sue in his ward's name. But ejectment must be brought in his own name.[49] Generally, if unsuccessful, he is entitled to his costs and expenses out of the ward's estate, but not so in groundless, speculative, fraudulent, or imprudent suits. If he is appointed guardian *ad litem* in a particular suit, and is by statute liable for costs, and is compelled to pay them, he has his remedy against the ward's estate if he has not misconducted. Joint guardians may sue jointly.

Joint Guardians. — The receipt or discharge of one binds all. Neither can act in defiance of the other. Each is liable for the other's misapplication of the trust funds with his consent, but otherwise, in the absence of negligence, is liable only for what he receives.[50]

Guardian in Fact. — One who acts as guardian is liable as such; as a step-father,[51] or one irregularly appointed.[52] But not an executor or administrator in lawful possession of the minor's property.[53] One appointed is liable for acts before qualifying,[54] and after the ward's majority so long as he retains the estate.[55]

[49] Holmes *v.* Seely, 17 Wend. 75.
[50] Kirby *v.* Turner, Hopkins, 309.
[51] Espey *v.* Lake, 15 Eng. L. & Eq. 579.
[52] Crooks *v.* Turpin, 1 B. Mon. 183.
[53] Bibb *v.* McKinley, 9 Port. 636.
[54] Magruder *v.* Darnall, 6 Gill, 269.
[55] Armstrong *v.* Walkup, 12 Gratt. 608.

Rights of Foreign Guardians as to Property. — As to real estate, the law of the country where it is situated must govern. It is held that a foreign guardian is not entitled to personal property situated in another State.[56] This is the general rule. In the absence of statutory authority a guardian cannot maintain an action abroad.[57] On principles of comity foreign guardians are sometimes recognized, but not without reciprocity. So where an English court refused to award the custody of a minor to his American guardian, our court refused to recognize the decree of the English court that the American guardian should transmit the income of the ward's property to England.[58]

A guardian may be personally liable for the support and education of his ward, left by his consent with a guardian in another State.[59]

Sale of Real Estate. — This is regulated by statute. The court of chancery possessed no inherent power to order sale of an infant's real estate.[60] So of our own courts.[61] And whenever a sale was authorized it was subject to his right of disaffirmance at majority. But the legislature might always order a sale, and therefore statutory authority for

[56] Morrell *v.* Dickey, 1 Johns. Ch. 153.

[57] Leonard *v.* Putnam, 51 N. H. 247; 12 Am. Rep. 106.

[58] *Ex parte* Dawson, 3 Bradf. 130.

[59] Spring *v.* Woodworth, 2 Allen, 206.

[60] Taylor *v.* Phillips, 2 Ves. Sr. 23.

[61] Baker *v.* Lorillard, 4 N. Y. 257. *Contra:* Dodge *v.* Cole, 97 Ill. 338; 37 Am. Rep. 111; Goodman *v.* Winter, 64 Ala. 410; 38 Am. Rep. 13.

such sales is valid, and such sales confer absolute title.[62]

Generally such sales are authorized when necessary for the infant's support or education; or his interest requires or will be promoted thereby on account of the land being waste, dilapidated, or unproductive; or for any other peculiar reasons. This power includes letting for a term of years and mortgaging, and mortgaging will always be preferred if sufficient for the purpose, but no sale or lease may be made contrary to the provisions of a devise by which the infant acquired his interest. The sale is made by a guardian specially appointed, who must give security. The proceeds are deemed real estate, and go to the general guardian, to be disposed of as the court shall direct.

To confer valid title, the statutory directions must be strictly pursued as to all essentials.

It has been held that these statutes, unless it is otherwise specially provided, apply only to sales of legal interests, and that independently the court may order sales of equitable estates.[63]

A guardian has an authority coupled with an interest, and therefore an act of the legislature empowering another to dispose of the estate is unconstitutional.[64]

The bond, accounting, and compensation of the guardian are regulated by statute.

[62] Leggett *v.* Hunter, 19 N. Y. 445.
[63] Wood *v.* Mather, 38 Barb. 473.
[64] Lincoln *v.* Alexander, 52 Cal. 482; 28 Am. Rep. 639.

RIGHTS AND LIABILITIES OF THE WARD.

The ward may restrain his guardian from committing waste, but whether he may sue him during the guardianship has been recently denied.[64a] He certainly cannot sue him for money had and received, but must remove him and resort to his official bond.

On the termination of the guardianship he may sue him for an accounting, but he may lose this right by delay. He must move in a reasonable time.

He will always receive the aid of the court in recovering property embezzled, concealed, or conveyed away in fraud of his rights. He may within a reasonable time after majority disaffirm a purchase of his property made by his guardian.

A settlement between guardian and ward before or shortly after majority is carefully scrutinized by the courts, and the ward will be protected against any unfair or unequal dealing.[65] But long acquiescence will debar the ward from impeaching it as against the guardian's surety, although the guardian is insolvent.[66]

A gift or conveyance from ward to guardian during or shortly after majority is presumed fraudulent, and will not be sustained except on the clearest proof of the utmost good faith.[67] This applies

[64a] McLane *v.* Curran, 133 Mass. 531.

[65] Ferguson *v.* Lowry, 54 Ala. 510; 25 Am. Rep. 718, and note, 728.

[66] Aaron *v.* Mendel, 78 Ky. 427; 39 Am. Rep. 248.

[67] Hylton *v.* Hylton, 2 Ves. Sr. 547.

to any one *in loco parentis*.[68] So where the late guardian procured the accommodation indorsement of his late ward on notes which parties took with notice of the fiduciary relationship, those parties were enjoined from resorting to the indorser.[69] But a voluntary will by the ward in the guardian's favor is not within this rule.[70]

In England a chancery ward could not marry without consent of the court, but this doctrine never obtained here. But here, if a ward's property is under control of a court of equity, a provision may be made in case of an improvident marriage.[71]

An infant is not liable for his guardian's malicious suit in his behalf, not originally authorized by the infant.[72]

[68] Berkmeyer *v.* Kellerman, 32 Ohio St. 239; 30 Am. Rep. 577.
[69] Gale *v.* Wells, 12 Barb. 84.
[70] Limburger *v.* Rauch, 2 Abb. Pr. (N. S.) 279.
[71] Van Duzer *v.* Van Duzer, 6 Pai. 366.
[72] Burnham *v.* Seaverns, 101 Mass. 360.

CHAPTER IX.

INFANCY.

AN infant is any person, male or female, under 21 years of age.

GENERAL DISABILITIES OF INFANTS.

1. *Holding Office.* — Generally an infant cannot hold any office of pecuniary or public responsibility.[1] He cannot be an administrator, executor, or trustee, nor an attorney, bailiff, factor, or receiver. He cannot now hold a legislative office, although in ancient times minors sat in Parliament. He cannot hold judicial office, such as justice of the peace.[2] He cannot be a juror nor an attorney at law. But he may be a notary public.[3]

2. *As to Crimes.* — An infant under 7 is conclusively deemed incapable of crime; between 7 and 14 *prima facie* so; and above 14 *prima facie* capable.[4] But an infant under 14 is generally held incapable of committing rape.[5] In New York, Ohio, and Louisiana, however, this presumption may be rebutted.[6]

[1] Claridge *v.* Evelyn, 5 B. & Ald. 81.
[2] Golding's Petition, 57 N. H. 146; 24 Am. Rep. 66.
[3] U. S. *v.* Bixby, 9 Fed. Rep. 78.
[4] Bish. Cr. L., § 460.
[5] Ibid., §§ 466, 672.
[6] People *v.* Randolph, 2 Park. Cr. 213.

3. *As to Testifying.* — An infant under 14 is presumed incompetent to testify, but there is no precise age at which he is excluded. One of 6 years has been permitted to testify.[7] Above 14 he is presumed competent, but may be shown not to be. The test is his capacity to understand the nature of an oath.

4. *As to Wills.* — At common law an infant cannot devise, but may make a will of personal property at 14, if a male, and at 12, if a female.

5. *As to Contracts.* — Formerly a distinction was recognized between void contracts and voidable contracts of an infant. Some were deemed absolutely void without disaffirmance at majority, while others were deemed binding unless so disaffirmed. It was early held that where the court can see that a contract is for the benefit of the infant it is binding; where it can see that it is to his prejudice it is void; where it is uncertain, it is voidable only.[8] This rule is approved by Story,[9] and by Kent.[10]

But the modern doctrine pronounces all his contracts, except those for necessaries and those void as between adults, voidable only.[11]

[7] State *v.* Ritchie, 28 La. Ann. 327; 26 Am. Rep. 100. See Carter *v.* State, 63 Ala. 52; 35 Am. Rep. 4.

[8] Keane *v.* Boycott, 2 H. Bl. 511.

[9] U. S. *v.* Bainbridge, 1 Mason, 82.

[10] 2 Kent Com. 236; Green *v.* Wilding, 59 Io. 679; 44 Am. Rep. 696.

[11] Harner *v.* Dipple, 31 Ohio St. 72; 27 Am. Rep. 496; Owen *v.* Long, 112 Mass. 403; Williams *v.* Moor, 11 M. & W. 266; Touch *v.* Parsons, 3 Barrow, 1794; Whitney *v.* Dutch, 14 Mass. 457; Reed *v.* Batchelder, 1 Metc. 559; Curtin *v.* Patton, 11 S. & R. 305; Hinely *v.* Margaritz, 3 Barr. 428; Batchin *v.* Cromach, 13 Vt. 330; Vaughn

An infant's contracts therefore differ from those of a married woman, at common law, the latter being absolutely void.

But infancy is a personal privilege. The adult is always bound, although the infant may retract. Thus, although a minor is not bound by his promise to marry an adult, yet the adult is bound.[12] So a third person, not a party to the contract, cannot take advantage of the infancy of a party; as an indorser, or surety, or one sued for enticing away an infant servant.[13] But others are not bound to contract with an infant; so an auctioneer is not bound to accept his bid.[14] An indorser of an infant's note is not bound without demand of the maker.[15] But the right of avoidance extends to representatives and privies; so an administrator may avoid his infant intestate's contract.[16]

An infant cannot bind himself by confession of judgment,[17] nor by agreement to arbitrate.[18] He may revoke his gift of personal property.[19]

v. Parr, 20 Ark. 600; Shropshire *v.* Burns, 46 Ala. 108; Fetrow *v.* Wiseman, 40 Ind. 148; Fonda *v.* Van Horne, 15 Wend. 631; Scott *v.* Buchanan, 11 Humph. 468; Cole *v.* Pennoyer, 14 Ill. 158; Cummings *v.* Powell, 8 Tex. 80; 1 J. J. Marsh, 236; Mustard *v.* Wohlford, 15 Gratt. 329.

[12] Holt *v.* Ward, 2 Str. 937.

[13] Motteux *v.* St. Aubin, 2 W. Bl. 1133.

[14] Kinney *v.* Showdy, 1 Hill, 544.

[15] Wyman *v.* Adams, 12 Cush. 210; Trustees *v.* Anderson, 63 Ind. 367.

[16] Counts *v.* Bates, Harp. 464.

[17] Oliver *v.* Woodroffe, 4 M. & W. 653.

[18] Barnaby *v.* Barnaby, 1 Pick. 221.

[19] Person *v.* Chase, 37 Vt. 647.

His executed contract is voidable as well as his executory contract; he may rescind the one as well as the other.[20]

CONTRACTS BINDING THE INFANT.

Necessaries. — The infant may bind himself by his contract for necessaries.

An infant's contracts are judged by the same rules as those of a married woman, and are the same with one addition — education.

What are necessaries for an infant: Presents to his bride: Genner *v.* Walker, 3 Am. L. Rev. 590. Wedding garments when about to marry: Sams *v.* Stockton, 14 B. Monr. 232. A bridal outfit and a chamber set: Jordan *v.* Coffield, 70 N. C. 110. A uniform for an officer's servant: Hands *v.* Staney, 8 T. R. 578. Counsel fees about his business: Munson *v.* Washband, 31 Conn. 303; as for defending him in a bastardy proceeding: Barker *v.* Hibbard, 54 N. H. 539; 20 Am. Rep. 160; or in a proper divorce suit for his wife: Stocken *v.* Pattrick, 29 L. T. (N. S.). Dentistry: Strong *v.* Foote, 42 Conn. 203. Regimentals for a member of a volunteer corps: Coates *v.* Wilson, 5 Esp. 152. A pair of spurs, a suit of best kersey-made horse-clothing, a breastplate, and a set of best plated harness, for an infant of some expectations, who managed his father's farm: Hill *v.* Arbon, 34 L. T. (N. S.) 125. A horse prescribed for exercise: Hart *v.* Prater, 1

[20] Hill *v.* Anderson, 5 S. & M. 216.

Jur. 623. Sleeve-links: Ryder *v.* Wombwell, L. R. 3 Exch. 90.

What are not necessaries for an infant: Treats of an undergraduate at college: Brooker *v.* Scott, 11 M. & W. 67. A collegiate education: Middlebury College *v.* Chandler, 16 Vt. 683. A professional education: Turner *v.* Gaither, 89 N. C. 357; 35 Am. Rep. 574. A pair of shirt-studs worth £25, and a silver presentation goblet: Ryder *v.* Wombwell, L. R. 3 Exch. 90. A stud of horses: Merrain *v.* Cunningham, 11 Cush. 40. Betting books: Genner *v.* Walker, 3 Am. L. Rev. 590. Saddles, horses, and carriages: Harrison *v.* Fane, 1 M. & G. 550. Cockades for an officer's whole company: Hands *v.* Staney, 8 T. R. 578. A tailor's bill of £840 in thirteen months, including nineteen coats, forty-five waistcoats, and thirty-eight pairs of trousers: Barghardt *v.* Angerstein, 6 C. & P. 690. Kid gloves, cologne, and walking canes: Lefils *v.* Lugg, 15 Ark. 137. An insurance policy: N. H. Ins. Co. *v.* Noyes, 32 N. H. 345. Counsel fees about his real estate: Phelps *v.* Worcester, 11 N. H. 51. Timber to repair his house: Freeman *v.* Bridger, 4 Jones' L. 1. Tobacco: Bryant *v.* Richardson, L. R. 3 Ex. 93. A chronometer, for a lieutenant in the royal navy: Berolles *v.* Ramsay, Holt, 77. A pony: Miller *v.* Smith, 20 A. L. J. 412. A hunter worth £150, for an infant representing himself to have an allowance of £600 a year. A stanhope for a son of a clergyman: Charters *v.* Baynton, 7 C. & P. 52. Dinners, game, poultry, suppers, ices, soda water, fruits and confec-

tionery, *prima facie:* Wharton *v.* Mackenzie, 5 Q. B. 606. The old books shut out balls and serenades.

The doctrine of necessaries does not apply to an infant's trading contracts. So, board of horses of an infant hackman is not a necessary;[21] nor is rent of a shop where he carries on the business of a barber.[22]

The infant's contract for necessaries does not bind him when he is sufficiently supplied by his father, mother, or guardian. If he resides at home, *prima facie* he is not liable;[23] but if away, he is usually liable.[24] And the law will imply a promise where he has no protector.[25]

An infant is liable for money advanced by another to a third for necessaries for him.[26] It has been held otherwise at law, where the money was advanced directly to the infant, although used by him for necessaries.[27] But in equity he is liable.[28]

Anciently an infant was held bound by his deed for necessaries,[29] but not by his bond.[30] Recently his deed for necessaries was held voidable, but he was adjudged to pay the value of the necessaries

[21] Merriam *v.* Cunningham, 11 Cush. 40.
[22] Lowe *v.* Griffith, 1 Scott, 458.
[23] Wailing *v.* Toll, 9 Johns. 141.
[24] Angel *v.* McLellan, 16 Mass. 28.
[25] Hyman *v.* Cain, 3 Jones L. 111.
[26] Randall *v.* Sweet, 1 Den. 460.
[27] Ellis *v.* Ellis, 5 Mod. 368.
[28] Marlow *v.* Pitfeild, 1 P. Wms. 558; Smith *v.* Oliphant, 2 Sandf. 306.
[29] Com. Dig. Inft.
[30] Corpe *v.* Overton, 10 Bing. 252.

with interest.[31] Whether his note binds him for necessaries has been debated, but undoubtedly he may ratify it at majority. In the best opinion, however, such a note is binding, as an express promise can hardly be less effectual than an implied one.[32]

In addition, the following contracts of an infant are binding:—

Executed contracts of marriage.

For custody and maintenance of wife and children.

To bury his wife.[33]

Respecting a legal authority vested in him; as official contracts.

By statute; such as enlistments.

Apprenticeship.

During emancipation.

An infant is bound by a decree in equity against him, and by any judgment at law founded on an obligation legally binding him.

RATIFICATION AND AVOIDANCE OF CONTRACT.

Ratification. — In England the question of ratification is settled by statute providing that the ratification to be binding must be in writing signed by the party.

In this country the authorities are not harmonious. One line of authorities hold that a direct promise after majority is necessary to establish a

[31] Martin *v.* Gale, 36 L. T. (N. S.) 357.
[32] Bradley *v.* Pratt, 23 Vt. 378.
[33] Chapple *v.* Cooper, 13 M. & W. 259.

direct contract made during minority, and that a mere acknowledgment will not have that effect.[34] But this doctrine is repudiated in later cases, and the more modern doctrine seems to be that there need not be a precise and positive promise to pay the particular debt, but that an express confirmation and substantial promise, after majority, is sufficient.[35]

But what amounts to a ratification has been much mooted. A direct promise to pay would seem to constitute a perfect ratification, but there is much hair-splitting as to what constitutes a direct promise. Some cases hold that where one says he owes the debt, but has not the means to pay it, but will pay it as soon as he can, or words to that effect, this is a mere acknowledgment, not amounting to a direct or new promise.[36]

Without any express promise, the general doctrine is that affirmative acts of ownership and enjoyment of the property, with knowledge of all the circumstances, or recognition of the validity of the contract, without any act or declaration of disaffirmance, are sufficient; as retaining possession, using, selling, mortgaging, or converting the property to the in-

[34] Proctor *v.* Sears, 4 Allen, 95.

[35] Henry *v.* Root, 33 N. Y. 545; Baker *v.* Kennett, 54 Mo. 82.

[36] Proctor *v.* Sears, *supra;* Ford *v.* Phillips, 1 Pick. 202; Thompson *v.* Lay, 4 id. 48; Goodsell *v.* Myers, 3 Wend. 479; Hale *v.* Gerrish, 8 N. H. 374; Wilcox *v.* Roath, 12 Conn. 550; Chandler *v.* Glover, 32 Penn. St. 509; Conklin *v.* Ogborn, 7 Ind. 553; Martin *v.* Byrom, Dudley (Ga.) 203; Bank of Silver Creek *v.* Browning, 16 Abb. Pr. 272; Dunlap *v.* Hales, 2 Jones (N. C.) L. 381.

fant's own use.[37] So of part payment.[38] So of continuing to work for a month after majority on a contract for labor.[39] Slight declarations indicating recognition of the contract will suffice to warrant a verdict.[40]

But the acts must be affirmative; mere passive or indecisive conduct will not answer. So submitting the question of liability to arbitration, or retaining consideration money, will not work a ratification.[41] And the sale during minority of real estate acquired in infancy, and the retention of the proceeds after majority, is not an affirmance.[42] Passive conduct amounting to an estoppel may effect a ratification; as where the infant, after coming of age, sees a purchaser of his real estate expending considerable sums in permanent improvements on it, and for years fails to assert his title;[43] or knowingly permits another to purchase from such purchaser without notifying him of his claim.[44] But a married woman, on arriv-

[37] Lawson *v.* Lovejoy, 8 Me. 405; Boyden *v.* Boyden, 9 Metc. 519; Cheshire *v.* Barrett, 4 McCord, 241; Boody *v.* McKenney, 23 Me. 517; Robbins *v.* Eaton, 10 N. H. 561; Chapin *v.* Shafer, 49 N. Y. 407.

[38] Little *v.* Duncan, 9 Rich. Law. 55; Stokes *v.* Brown, 4 Chand. (Wis.) 39; Henry *v.* Root, 33 N. Y. 526.

[39] Forsyth *v.* Hastings, 27 Vt. 646.

[40] Hoit *v.* Underhill, 9 N. H. 436; Bay *v.* Gunn, 1 Den. 108; Cheshire *v.* Barrett, 4 McCord, 241; Whitney *v.* Dutch, 14 Mass. 457; Uecker *v.* Koehn, 21 Neb. 559; 59 Am. Rep. 849.

[41] Benham *v.* Bishop, 9 Conn. 330.

[42] Walsh *v.* Powers, 43 N. Y. 23; 3 Am. Rep. 654.

[43] Wheaton *v.* East, 5 Yerg. 41; Wallace *v.* Lewis, 4 Harring. 75; Highley *v.* Barrow, 49 Me. 103; Thompson *v.* Strickland, 52 Miss. 574; Jones *v.* Phœnix Bank, 4 Seld. 235.

[44] Hall *v.* Simmons, 2 Rich. Eq. 120; Alsworth *v.* Cordtz, 31 Miss. 32; Belton *v.* Briggs, 4 Dessaus. 465; Cresinger *v.* Welch, 15 Ohio, 156; Emmons *v.* Murray, 16 N. H. 385; Norris *v.* Wait, 2 Rich. (S. C.) 148.

ing at full age, is still excused by her coverture from implied ratification.[45]

Mere lapse of time, disconnected from affirmative acts or conduct amounting to an estoppel, will not amount to a ratification. So of a conveyance of real estate, and acquiescence, short of the statutory period of limitation, and in the absence of improvements.[46] But even a brief lapse of time, in connection with affirmative acts, will strengthen the evidence of ratification.[47]

The absence of express repudiation will not alone constitute a ratification.[48] It has been held otherwise in a few partnership and stock cases.[49]

It has been held that it is not essential to a valid ratification that the party should know that he was not legally liable.[50] But the contrary seems more reasonable and better supported.[51]

[45] Sims *v.* Everhardt, 102 U. S. 300; McMorris *v.* Webb, 17 S. C. 558.

[46] Tucker *v.* Moreland, 10 Pet. 58; Boody *v.* McKenney, 23 Me 517; Drake *v.* Ramsey, 5 Ohio, 251; Jackson *v.* Burchin, 14 Johns. 124; Urban *v.* Grimes, 2 Grant, 96; Vaughn *v.* Parr, 20 Ark. 600; Voorhies *v.* Voorhies, 24 Barb. 150; Ware *v.* Brush, 1 McLean, 533; Moore *v.* Abernathy, 7 Blackf. 442; Cole *v.* Pennoyer, 14 Ill. 158; Green *v.* Green, 69 N. Y. 553; Huth *v.* Carondelet Ry. and D. Co., 56 Mo. 202; Wallace *v.* Latham, 52 Miss. 291; McMurray *v.* McMurray, 66 N. Y. 175; Gillespie *v.* Bailey, 12 W. Va. 70; 29 Am. Rep. 445.

[47] Cresinger *v.* Welch, *supra.*

[48] Holmes *v.* Blogg, 8 Taunt. 39; Richardson *v.* Boright, 9 Vt. 368; Kline *v.* Beebe, 6 Conn. 494; Hoit *v.* Underhill, 9 N. H. 439.

[49] Goode *v.* Harrison, 5 B. & Ald. 147; Dublin and W. Ry. Co. *v.* Black, 8 Exch. 181.

[50] Morse *v.* Wheeler, 4 Allen, 570.

[51] Baker *v.* Kennett, 54 Mo. 82; Petty *v.* Roberts, 7 Bush (Ky.)

As good a rule as can be constructed on this subject is laid down by Mr. Schouler as follows: "That the mere acknowledgment that a certain transaction constitutes a debt, is sufficient to bind him lately an infant; but that an acknowledgment to the extent that he justly owes a debt, with equivocal expressions as to some future payment, may or may not be considered sufficient, though the better opinion is in favor of their sufficiency; that acts or omissions on his part, which are prejudicial to the adult party's interests, or evince his own intention to retain the advantages of a contract made during infancy, may be, especially when reasonable time has elapsed, construed into a ratification, the presumption of honorable motives being fair and reasonable under such circumstances; and finally that a distinct, unequivocal promise, verbal or written, made after attaining majority, is always sufficient, this apparently superseding the former promise altogether." [52]

Avoidance. — Any act clearly showing an intention not to be bound, such as a distinct declaration and conveyance to another, will suffice.[53] So of a contract of sale.[54]

Disaffirmance of a sale of real estate need not be preceded by refunding or offering to refund the pur-

410; Owen *v.* Long, 112 Mass. 403; Curtin *v.* Patton, 11 S. & R. 305; Hinely *v.* Margariz, 3 Barr, 428; Chambers *v.* Wherry, 1 Bailey (S. C.) 28; Norris *v.* Vance, 3 Rich. (S. C.) 164; Tobey *v.* Wood, 123 Mass. 88; 25 Am. Rep. 27.

[52] Schoul. Dom. Rel. 582.

[53] State *v.* Plaisted, 43 N. H. 413.

[54] Mustard *v.* Wohlford, 15 Gratt. 329.

chase money.[55] And where the infant has spent or wasted the consideration before majority, and has no other property, he may still recover the property without refunding the consideration, and mere acquiescence for three years after majority is not a ratification.[56] But he cannot retain property and avoid paying the purchase money.[57] This applies to both real and personal property.

If the infant sells goods and receives the price, he cannot recover the goods without restoring the price.[58] Nor may he injure property which he has received, and recover the full price on offering to restore it.[59] Nor recover partnership property, after rescinding the partnership agreement, while partnership debts are outstanding.[60] If his former vendee is sued for use and occupation of land, he may recoup for improvements.[61]

Money paid by an infant on a contract which he has repudiated may be recovered, without any allowance to the other party for expenses or trouble.[62]

Where an infant contracts to perform labor, he may disaffirm on coming of age, and recover *quantum*

[55] Pitcher *v.* Laycock, 7 Ind. 398; Cresinger *v.* Welch, 15 Ohio, 156.

[56] Green *v.* Green, 69 N. Y. 553; 25 Am. Rep. 233; Dill *v.* Bowen, 54 Ind. 204; Miller *v.* Smith, 26 Minn. 248; 37 Am. Rep. 407.

[57] Kline *v.* Beebe, 6 Conn. 494; Hillyer *v.* Bennett, 3 Edw. 222; Hall *v.* Butterfield, 59 Am. Rep. 354; 47 Am. Rep. 209. But he may rescind without restoring goods when they have been taken from him on execution. Lemmon *v.* Beeman, 45 Ohio St. 505.

[58] Bartholomew *v.* Finnemore, 17 Barb. 428. [59] Ibid.

[60] Furlong *v.* Bartlett, 21 Pick. 401; Adams *v.* Beall, 67 Md. 53; 1 Am. St. Rep. 379.

[61] Weaver *v.* Jones, 24 Ala. 420.

[62] Shurtleff *v.* Millard, 12 R. I. 272; 34 Am. Rep. 640.

meruit;[63] without any allowance to the other party for damages.[64] But not where the contract was reasonable, is executed, and the other party did not know of his infancy.[65] So where an infant had contracted for service, covenanting not to carry on the same business, and continued in the service eighteen months after majority, without repudiating, *held* that he was bound.[66] The right of disaffirmance extends to a minor's heir.[66*]

INJURIES AND FRAUDS OF INFANTS.

1. *Committed by Infants.* — An infant is liable for his torts like an adult.

For every injury to the person or property of another he is bound to respond, and his infancy is no defence.

His age may render a tort an unavoidable accident which would not be so in an adult;[67] but for a tort with force he is liable at any age.[68] Thus:

Infancy is no defence to an action of assault and battery;[69] even when unintentional;[70] nor for overdriving a horse;[71] nor for nuisance;[72] nor for con-

[63] Gaffney *v.* Hayden, 110 Mass. 137; 14 Am. Rep. 580.

[64] Medbury *v.* Watrous, 7 Hill, 110; Derocher *v.* Continental Mills, 58 Me. 217; 4 Am. Rep. 286. But *contra* on last point, Shurtleff *v.* Millard, *supra*.

[65] Spicer *v.* Earl, 41 Mich. 191; 32 Am. Rep. 152.

[66] Wilkinson *v.* Joughin, 41 L. J. Ch. 234.

[66*] Harris *v.* Ross, 86 Mo. 89; 56 Am. Rep. 411.

[67] Bullock *v.* Babcock, 3 Wend. 391.

[68] Neal *v.* Gillett, 23 Conn. 437.

[69] Peterson *v.* Haffner, 59 Ind. 130; 26 Am. Rep. 81, and note, 83.

[70] Conway *v.* Reed, 66 Mo. 346; 27 Am. Rep. 354.

[71] Towne *v.* Wiley, 23 Vt. 355. [72] McCoon *v.* Smith, 3 Hill, 147.

version of an article bailed;[73] nor for trover;[74] nor for detinue;[75] nor for embezzlement;[76] nor for money stolen;[77] nor for obtaining goods on credit intending not to pay.[78]

An infant is liable for his trespass even if committed by command of his father;[79] and on his note given to settle his tort;[80] and for a wrongful act by color of office, as a levy by an infant constable.[81]

Infancy is a good defence to an action on a contract procured by the infant's fraudulent representations; as for goods sold him on his fraudulent representation that he was of age.[82] So in an action for the fraudulent representation and deceit.[83] But in equity in England he is held accountable.[84]

An infant is not estopped by his act unless it is fraudulent. Thus, where an infant of 16, at her mother's request, signed her mother's name to a deed of the infant's real estate, for which an innocent person paid a large sum of money, the infant

[73] Towne *v.* Wiley, *supra*.

[74] Campbell *v.* Stakes, 2 Wend. 137; Freeman *v.* Boland, 14 R. I. 27.

[75] Mills *v.* Graham, 4 B. & P. 140.

[76] Elwell *v.* Martin, 32 Vt. 217.

[77] Shaw *v.* Coffin, 58 Me. 254; 4 Am. Rep. 290.

[78] Wallace *v.* Morss, 5 Hill, 391.

[79] Scott *v.* Watson, 46 Me. 362.

[80] Ray *v.* Tubbs, 50 Vt. 688; 28 Am. Rep. 519.

[81] Green *v.* Burke, 23 Wend. 490.

[82] Conrad *v.* Lane, 26 Minn. 389; 37 Am. Rep. 412; Wieland *v.* Kobick, 110 Ill. 16; 51 Am. Rep. 676; Neff *v.* Landis, 110 Penn. St. 204. *Contra:* Rice *v.* Boyer, 108 Ind. 272; 58 Am. Rep. 53.

[83] Merriam *v.* Cunningham, 11 Cush. 40; Brown *v.* McCune, 5 Sandf. 224; Studwell *v.* Shapter, 54 N. Y. 249.

[84] *In re* Unity, etc., Asso., 3 DeG. & J. 63; Lempriere *v.* Lange, 41 L. T. (N. S.) 378; 12 Ch. D. 675.

was held not estopped from subsequently claiming title to the premises. And it has been held that an infant wife is not bound by her release of dower, although she declared herself of age to the acknowledging officer.[85]

2. *Suffered by Infants.* — The ordinary principles apply as in the case of adults, with some enlargement on account of the inexperience of infants.

Thus, a child, eight years old, may maintain an action against one who sold him gunpowder at his own request, whereby he was injured.[86]

But on the other hand, it has been held that if he is clearly a trespasser, he cannot recover; as where he puts his fingers in a dangerous machine left on sale in a public place.[87] But yet he may recover, even when a trespasser, provided he acted with the care usual in persons of his age, and the defendant was negligent; as where injured while playing on a turntable left unfastened and unguarded in a public place;[88] or where a boy 13 years old struck a dog, vicious and at large, which thereupon bit him.[89]

The negligence of parents or others having charge of an infant is attributable to the infant; as where

[85] Spencer *v.* Carr, 45 N. Y. 406; 6 Am. Rep. 112; Watson *v.* Billings, 38 Ark. 278; 42 Am. Rep. 1; McMorris *v.* Webb, 17 S. C. 558.

[86] Carter *v.* Towne, 98 Mass. 567; Binford *v.* Johnston, 82 Ind. 426; 42 Am. Rep. 508.

[87] Mangan *v.* Atterton, L. R. 1 Exch. 239.

[88] Keffe *v.* Mil. and St. P. R. R. Co., 21 Minn. 207; 18 Am. Rep. 393. See 31 Am. Rep. 203.

[89] Plumley *v.* Birge, 124 Mass. 57; 26 Am. Rep. 645.

a child of tender years is negligently suffered to run in the highway, and there sustains injury.[90] The rule of New York, Massachusetts, and Illinois is that a child too young to have discretion cannot recover if his protector fails to exercise ordinary care, but he may recover if he uses the care common to such children and his protector exercises ordinary care.[91] If the child exercises due care, the defendant is liable irrespective of the parent's negligence; but if not, the conduct of the parents is essential to determine the liability.[92] In Vermont, Pennsylvania, and Connecticut, the child's exercise of ordinary care is alone regarded.[93] Formerly in England the protector's negligence was ignored,[94] but more recently the New York doctrine seems gaining favor.[95] That doctrine however has been very recently repudiated in Texas, Michigan, Mississippi, and Iowa.[96]

The infant's release or compromise of his right of action is not binding;[97] nor is his father's release binding on the infant.[98]

[90] Hartfeld *v.* Roper, 21 Wend. 617.

[91] Mangam *v.* Brooklyn R. Co., 38 N. Y. 455; Chicago *v.* Starr, 42 Ill. 174; Wright *v.* Malden R. Co., 4 Allen, 283.

[92] Ihl *v.* Forty-second Street R. Co., 47 N. Y. 317; 7 Am. Rep. 450; McGary *v.* Loomis, 63 N. Y. 104; 20 Am. Rep. 510, and note, 512.

[93] Robinson *v.* Cone, 22 Vt. 214; Daley *v.* Norwich and W. R. Co., 26 Conn. 591; Kay *v.* Penn. R. Co., 65 Penn. St. 269; 3 Am. Rep. 628; North Penn. R. Co. *v.* Mahoney, 57 Penn. St. 187; Erie City Pass. Ry. Co. *v.* Schuster, 113 Penn. St. 412; 57 Am. Rep. 471.

[94] Lynch *v.* Nurdin, 1 A. & E. (Q. B.) 29.

[95] Lygo *v.* Newbold, 9 Ex. 302; Waite *v.* N. R. Co., 5 Jur. (N. S.) 936; El. Bl. & El. 719.

[96] Galveston, etc., Ry. Co. *v.* Moore, 59 Tex. 64; Westbrook *v.* Mobile, etc., R. Co., Miss. ; Wymore *v.* Mahask County, Iowa, .

[97] Baker *v.* Lovett, 6 Mass. 78.

[98] Loomis *v.* Cline, 4 Barb. 453.

Infants' Suits. — Infants have rights of action and are subject to suit. But they cannot prosecute or defend either in person or by attorney, but only by guardian or next friend. Nothing can be taken against an infant by his admission in the suit. He is liable for costs. The statute of limitations does not run against him during minority, and usually by statute this immunity is extended for a certain period after majority.

CHAPTER X.

MASTER AND SERVANT.

A MASTER is one who has legal authority over another who owes him service.

Strictly speaking, so far as this subject comes within Domestic Relations, it should be confined to menial service, but usage has brought under this title many other relations, particularly that of employer and employee. I shall inquire particularly concerning

1. The relation and its rights generally.
2. The rights, liabilities, and duties of master toward servant.
3. The rights, duties, and liabilities of servant toward master.
4. The liability of master to third persons.
5. The liability of servant to third persons.
6. The liability of third persons to master.

I. THE RELATION AND ITS RIGHTS GENERALLY.

1. *Who are servants.* — The boundary between master and servant and principal and agent is uncertain and capricious. By servants generally are understood not only house servants, but farm servants and apprentices. I shall use the term as including all such employees as are in the exclusive

service of the employer and constructively under his supervision, as clerks in stores, operatives in mills, persons employed on public conveyances, and the like.

It must be observed that the relation implies the right of the master to direct and control the servant. Therefore one exercising an independent employment, like a contractor, is not within the relation or its rules.[1]

A distinction is made by custom between menial or domestic servants and others, in reference to the right of discharge; and a huntsman[2] and a gardener[3] are included within the description of menials or domestics, although not living in the master's house; while a governess in the house is not.[4]

A laborer working a farm on shares has been deemed not a servant so as to give the master a right of action for enticing him away;[5] but the contrary has been held.[6]

2. *The creation of the relation.* — This is always by contract express or implied, usually by hiring. A general hiring, without any limitation of time, is construed by the common law as a year in the case

[1] Harrison *v.* Collins, 86 Penn. St. 153; 27 Am. Rep. 699, and note, 702; City of Erie *v.* Caulkins, 85 Penn. St. 247; 27 Am. Rep. 642, and note, 647; Hexamer *v.* Webb, 101 N. Y. 377; 54 Am. Rep. 703.

[2] Nicoll *v.* Greaves, 17 C. B. (N. S.) 27.

[3] Nowlen *v.* Ablett, 2 C. M. & R. 54.

[4] Todd *v.* Kerrich, 8 Ex. 151.

[5] Burgess *v.* Carpenter, 2 S. C. 7; s. c., 16 Am. Rep. 643.

[6] Haskins *v.* Royster, 70 N. C. 601; s. c., 16 Am. Rep. 780; Huff *v.* Watkins, 15 S. C. 82; 40 Am. Rep. 680.

of agricultural servants.[7] By custom, in the case of domestic servants the hiring is construed as monthly.[8] The rule of the common law is modified by contract; by custom; and by date and frequency of payments; but generally the common-law rule still holds.[9]

A contract for service which by its terms cannot be completed in a year is void under the statute of frauds unless in writing. So an oral hiring for a year to commence at a future day is void.[10] But for a year from the next day is valid.[11]

The contract must be between persons capable of contracting. When any legal disability exists on either side it cannot be enforced.

The contract may be created by implication, without an express hiring, as where one volunteers a service which the other knows of and recognizes. But there must be knowledge and recognition to render it binding.[12] One cannot by simply volunteering a service compel the other to pay for it.[13]

Nor does one already a servant become a servant of another by the latter's false statement that the master had directed him to assist.[14]

[7] 1 Bl. Com. 425.

[8] Fawcett *v.* Cash, 5 B. & Ad. 904.

[9] Hathaway *v.* Bennett, 10 N. Y. 108.

[10] Bracegirdle *v.* Heald, 1 B. & Ald. 722; Sutcliffe *v.* Atlantic Mills, 13 R. I. 480; 43 Am. Rep. 39.

[11] Dickson *v.* Frisbee, 52 Ala. 165; s. c., 23 Am. Rep. 565.

[12] Webb *v.* Cole, 20 N. H. 490; Academy *v.* Allen, 14 Mass. 176.

[13] Caldwell *v.* Eneas, 2 Mill. (S. C.) 348; Bartholomew *v.* Jackson, 20 Johns. 28; Woods *v.* Ayers, 39 Mich. 345; 33 Am. Rep. 396.

[14] Kelly *v.* Johnson, 128 Mass. 530; 35 Am. Rep. 398.

3. *Termination of the relation.* — This is ordinarily by expiration of the term of service; but the master may discharge the servant for wilful disobedience of a lawful order; for gross moral misconduct; for habitual negligence.

1. *Disobedience.* — As where a servant was ordered to go on an errand just as dinner was ready, and refused to go without his dinner;[15] or where a harvest hand refused to work without beer;[16] or where a housemaid persisted in going to see her sick mother.[17]

2. *Moral misconduct.* — As pregnancy of a maid-servant;[18] embezzlement, although less than his arrears of wages;[19] robbery;[20] habitual drunkenness;[21] fraudulent conduct toward the master;[22] engaging in the same business on his own account during the term of service;[23] betraying his master's confidence;[24] sending a challenge to fight a duel.[24a]

3. *Negligence.* — The servant may be discharged for wanton negligence, or palpable inefficiency

[15] Spain *v.* Arnott, 2 Stark. 256.
[16] Lilley *v.* Elwin, 11 Q. B. 742.
[17] Turner *v.* Mason, 14 M. & W. 112. But see Shaver *v.* Ingham, 58 Mich. 649; 55 Am. Rep. 712.
[18] Hobbs *v.* Harlan, 10 Lea, 268.
[19] Spotswood *v.* Barrow, 5 Ex. 110.
[20] Libhart *v.* Wood, 1 W. & S. 265.
[21] Consolis *v.* Gearhart, 31 Mo. 585.
[22] Singer *v.* McCormick, 4 W. & S. 266.
[23] Dieringer *v.* Meyer, 42 Wis. 311; s. c., 24 Am. Rep. 415.
[24] Beeston *v.* Collyer, 2 C. & P. 607.
[24a] Dolby *v.* Kinnear, 1 Kerr (N. Bruns.) 480.

amounting to a breach of an implied undertaking;[25] as where an apothecary's assistant employs an ignorant shop-boy to put up prescriptions to save himself work;[26] or where a scene-painter proves incompetent.[27]

The servant may also be discharged for any actual breach; as where a man contracts for the service of himself and his wife, and his wife dies.[28]

The contract is also dissolved by the death of either.

An unjustifiable act of the servant, not known to the master, does not justify dismissal for a cause insufficient in itself.[29]

II. RIGHTS, DUTIES, AND LIABILITIES OF MASTER TOWARD SERVANT.

1. *His rights.* — The master has no right to chastise an ordinary servant.[30] But he may chastise an apprentice. He may justify an assault in defence of his servant.[31]

2. *His duties.* — He is not bound to furnish the servant with medicines or medical attendance.[32] But

[25] Callo *v.* Brouncker, 4 C. & P. 518.

[26] Wise *v.* Wilson, 1 Car. & K. 662.

[27] Harmer *v.* Cornelius, 5 C. B. (N. S.) 236.

[28] Jennings *v.* Lyons, 39 Wis. 553; s. c., 20 Am. Rep. 57.

[29] Cussons *v.* Skinner, 11 M. & W. 161. But see Spotswood *v.* Barrow, 5 Ex. 110.

[30] Commonwealth *v.* Baird, 1 Ashm. 267; Davis *v.* State, 6 Tex. App. 133; Cooper *v.* State, 8 Baxt. 324; 35 Am. Rep. 704.

[31] 2 Kent Com. 261.

[32] Ibid.

otherwise as to an apprentice.[33] He is not bound to give him a "character" on dismissal.[34]

If the employment is dangerous beyond what manifestly appears, or if the servant is not of sufficient age or discretion to understand the manifest risks, it is the master's duty to notify him of the danger;[35] and in the case of an inexperienced person the master is bound to instruct him how to avoid the danger.[36]

The master is bound to the exercise of reasonable care in the selection of co-servants;[37] and to discharge them if to his knowledge they become incompetent;[38] and to employ a sufficient number for the safe performance of the work.[39]

The master is bound to use reasonable care in the selection and repair of machinery and appliances used by the servant.[40]

But the master does not warrant the competency, skill, or care of the co-servants.[41] He is only bound to use reasonable care in the selection and retention. That care is measured by the nature of the occupation and the probable consequences of the employ-

[33] Reg. *v.* Smith, 8 C. & P. 153.

[34] Carroll *v.* Bird, 3 Esp. 201.

[35] Baxter *v.* Roberts, 44 Cal. 187; s. c., 13 Am. Rep. 160, and note, 164; Dowling *v.* Allen, 74 Mo. 13; 41 Am. Rep. 298.

[36] Sullivan *v.* India Mfg. Co., 113 Mass. 396; Fones *v.* Phillips, 39 Ark. 17; 43 Am. Rep. 264; Larson *v* Berquist, 34 Kans. 334; 55 Am. Rep. 249.

[37] Moss *v.* Pacific R. Co., 49 Miss. 167; s. c., 8 Am. Rep. 126.

[38] Laning *v.* N. Y. C. R. Co., 49 N. Y. 521; s. c., 10 Am. Rep. 417.

[39] Booth *v.* B. & A. R. Co., 73 N. Y. 38; s. c., 29 Am. Rep. 97.

[40] Gibson *v.* Pacific R. Co., 46 Mo. 163; s. c., 2 Am. Rep. 497.

[41] Columbus, etc., R. Co. *v.* Troesch, 68 Ill. 545; s. c., 18 Am. Rep. 578.

ment of an incompetent person.[42] Thus a greater degree of care would be required in the selection of a locomotive engineer than of a brakeman or fireman.

Nor does the master warrant the soundness or fitness of the machinery or appliances.[43] Nor is he bound to adopt the latest improvements.[44] As for example, he is not bound to furnish a fire-escape for his mill.[45]

3. *His Liability.*—The master is liable to the servant for any injury arising from a breach of his duty to exercise reasonable care in the selection[46] and retention[47] of co-servants, or in the selection or repair of machinery or appliances;[48] or to point out dangers not manifest or appreciable in the employment;[49] but not otherwise.[50]

In respect to co-servants, the test in selection is due and reasonable care; and in retention, knowledge or notice of incompetency or unsafeness. It has been said that if the servant's unfitness is matter of general reputation, the master is chargeable with

[42] Tarrant *v.* Webb, 18 C. B. 797.

[43] Columbus, etc., R. Co. *v.* Troesch, 68 Ill. 545; s. c., 18 Am. Rep. 578; Hough *v.* Ry. Co. 100 U. S. 213.

[44] Stark *v.* Patterson, 6 Phila. 225.

[45] Jones *v.* Granite Mills, 126 Mass. 84; 30 Am. Rep. 661.

[46] Moss *v.* Pacific R. Co., 49 Mo. 167; s. c., 8 Am. Rep. 126.

[47] Laning *v.* N. Y. C. R. Co., 49 N. Y. 521; s. c., 10 Am. Rep. 417.

[48] Gibson *v.* Pacific R. Co., 46 Mo. 163; s. c., 2 Am. Rep. 497.

[49] Baxter *v.* Roberts, 44 Cal. 187; s. c., 13 Am. Rep. 160, and note, 164.

[50] See 1, 2, 3, 4.

negligence in employing or retaining him.[51] But to render the master liable for retaining a negligent servant, it must appear that the negligence is habitual. A single act of negligence is not sufficient.[52]

In respect to machinery or appliances the test is the master's knowledge of the defect, or his ability by the exercise of reasonable care to have learned it. If he knew or ought to have known, he is liable.

The master is not liable for an injury to the servant except when the servant is in the regular discharge of his duty. As where the servant, employed in a mine, went to a part of the mine which he knew to be dangerous, to visit another servant, and was there injured by reason of the dangerous condition of the mine, the master was held not liable.[53]

The master may be liable for an injury from defective machinery although the negligence of a co-servant contributed.[54]

Contributory Negligence.— It is a universal rule that subject to the master's duty to use reasonable care in selecting and retaining co-servants, in selecting and repairing machinery and appliances, and in pointing out dangers not manifest or appreciable, the servant takes upon himself the risks of the employment.[55]

[51] Gilman *v.* Eastern R. Co., 10 Allen, 233.

[52] Baulec *v.* N. Y. & H. R. Co., 59 N. Y. 356; 17 Am. Rep. 325.

[53] Wright *v.* Rawson, 52 Iowa, 329; 35 Am. Rep. 275. But see Broderick *v.* Detroit, etc., Co., 56 Mich. 261; 56 Am. Rep. 382.

[54] Cone *v.* Delaware, etc., R. Co., 81 N. H. 206; 37 Am. Rep. 491.

[55] Priestley *v.* Fowler, 3 M. & W. 1; Bartonshill Coal Co. *v.* Reid, 3 Macq. 284.

If the danger is as well known or as manifest to the servant as to the master, the servant enters or continues in the employment at his own risk.[56] The cases of unfenced machinery, low railway bridges, or coupling cars are examples.

If the servant continues in the employment after learning of the incompetency of his co-servant, he does so at his own risk.[57]

So if he continues in the employment after learning of its danger or of the defectiveness of any of the machinery or appliances.[58]

Subject to the master's duty to exercise reasonable care in the selection and retention of co-servants, the master is not liable to the servant for an injury occasioned to him by the negligence or want of skill of a co-servant.[59]

A general exception to the last two rules is where the servant notifies the master of the incompetency or the defectiveness, and the master promises to discharge the incompetent servant or repair the defective machinery or appliances, or the servant has a reasonable expectation that he will do so, if the servant continues in the employment it is a question of fact whether he was negligent in so doing.[60]

[56] Baylor *v.* Delaware, etc., R. Co., 11 Vroom, 23; s. c., 29 Am. Rep. 208, and note, 210; Ladd *v.* New Bedford R. Co., 119 Mass. 412; s. c., 20 Am. Rep. 331. But see St. Louis, etc., R. Co. *v.* Irwin, 37 Kans. 701; 1 Am. St. Rep. 266.

[57] Davis *v.* Detroit & M. R. Co., 20 Mich. 105; s. c., 4 Am. Rep. 364.

[58] Greenleaf *v.* Cent. R. Co., 29 Iowa, 14; s. c., 4 Am. Rep. 181.

[59] Farwell *v.* B. & W. R. Co., 4 Metc. (Mass.) 49; Feltham *v.* England, L. R. 2 Q. B. 33.

[60] Davis *v.* Detroit & M. R. Co., 20 Mich. 105; s. c., 4 Am. Rep. 364; Coombs *v.* New Bedford Cordage Co., 102 Mass. 572; s. c., 3

Ordinarily, contributory negligence is a question of fact. Sometimes negligence is so apparent as to be matter of legal conclusion, but in other cases it is modified by circumstances so as to be negligence neither in fact nor law, although apparently negligent. For example: a seaman on a voyage is bound to obey the orders of the master at all hazards, and consequently in so doing is not chargeable with contributory negligence where he exposes himself to a manifest risk and danger and receives injury in consequence of the defective condition of the ship's appliances.[61] So of a locomotive engineer who remains at his post of duty in the face of danger, when he might have left it and escaped.[62]

Who are Co-servants. — The rule is thus stated in a leading case. "A master is not liable to those in his employ for injuries resulting from the negligence, carelessness, or misconduct of a fellow-servant engaged in the same general business. Nor is the liability of the master enlarged where the servant who has sustained an injury is of a grade of the service inferior to that of the servant or agent whose negligence, carelessness, or misconduct has caused the injury, if the services of each, in his particular labor, are directed to the same general end. And though the inferior in grade is subject to the direction or

Am. Rep. 506; Clarke *v.* Holmes, 7 Hurl. & N. 937; Hough *v.* Ry. Co., 100 U. S. 213. But he must not continue longer than a reasonable time after the unfulfilled promise. Eureka Co. *v.* Bass, 81 Ala. 200; 60 Am. Rep. 152.

[61] Thompson *v.* Herman, 47 Wis. 602; 32 Am. Rep. 784. See Williams *v.* Churchill, 137 Mass. 243; 50 Am. Rep. 304.

[62] Cottrill *v.* Chicago, etc., R. Co., 47 Wis. 634; 32 Am. Rep. 796.

control of the superior whose act or omission has caused the injury, the rule is the same. Nor is it necessary, to exempt the master from liability, that the sufferer and the one who causes the injury should be at the time engaged in the same particular work. If they are in the employment of the same master, engaged in the same common work, and performing duties and services for the same general purposes, the master is not liable."[63]

Thus, if the negligence is that of a foreman or superintendent, the master is not liable.[64]

The common employment and the same general control must combine. It is subjection to the same general control, coupled with an engagement in the same common pursuit, that affords the test.[66] If there is a natural connection between the different classes of service, such as necessarily brings the servants into contact with each other in the prosecution of their work, they are co-servants, however dissimilar their occupations may be. As where a carpenter on a scaffold was injured by porters shifting a locomotive on a turntable.[67] A railway brakeman, and

[63] Laning *v.* N. Y. C. R. Co., 49 N. Y. 521; s. c., 10 Am. Rep. 417. See, also, Chicago & Alton R. Co. *v.* Murphy, 53 Ill. 336; s. c., 5 Am. Rep. 48; Lawlor *v.* Androscoggin R. Co., 62 Me. 463; s. c., 16 Am. Rep. 492, and note, 495. But see Cowles *v.* Richmond & Danville R. Co., 84 N. C. 309; 37 Am. Rep. 620.

[64] Wigmore *v.* Jay, 5 Ex. 354; Wilson *v.* Merry, L. R. 1 Sc. App. 326; Malone *v.* Hathaway, 64 N. Y. 5; s. c., 21 Am. Rep. 573, and note, 579; Brothers *v.* Cartter, 52 Mo. 373; s. c., 14 Am. Rep. 424; Lewis *v.* St. Louis R. Co., 59 Mo. 495; s. c., 21 Am. Rep. 385; Peterson *v.* Whitebreast Coal & Mining Co., 50 Iowa, 673; 32 Am. Rep. 143.

[66] Wood, Mast. & Serv., § 435.

[67] Morgan *v.* Vale of Meath Ry. Co., L. R. 1 Q. B. 149.

a train-despatcher;[68] a railway fireman, and a telegraph operator and the conductor;[69] are examples. In Illinois, the holding that a track-repairer and a fireman on an engine are not fellow-servants must be regarded as a departure from the law as well-established except in a few jurisdictions.[70]

To this general rule there are two exceptions arising out of the master's delegation of his authority:

1. Where the delegation is necessary, as in the case of a corporation, which can act only by agents of different grades. There the corporation is liable for negligence or want of proper care, in respect to such acts and duties as it is required to perform and discharge as master or principal, without regard to the rank or title of the agent intrusted with their performance. As to such acts the agent occupies the place of the corporation, and the latter is deemed present and consequently liable for the manner of performance.[71]

[68] Robertson *v.* Terre Haute, etc., R. Co., 78 Ind. 77; 41 Am. Rep. 552.

[69] Slater *v.* Jewett, 85 N. Y. 61; 39 Am. Rep. 627. See Tierney *v.* Minn., etc., R. Co., 33 Minn. 311; 53 Am. Rep. 35; Darrigan *v.* N. Y., etc., R. Co., 52 Conn. 285; 52 Am. Rep. 590. See notes, 49 Am. Rep. 406; 52 id. 280; 55 id. 45, 621; Chic., etc., R. Co. *v.* Ross, 112 U. S. 337.

[70] Chicago, etc., R. Co. *v.* Moranda, 93 Ill. 302; 34 Am. Rep. 168; Morris's Admr. *v.* Richmond, etc., Co., 78 Va. 745; 49 Am. Rep. 401; Chicago, etc., Ry. Co. *v.* Swanson, 16 Neb. 254; 49 Am. Rep. 718; Calvo *v.* Charlotte, etc., R. Co., 23 S. C. 526; 55 Am. Rep. 28; Kirk *v.* Atlanta, etc., R. Co., 94 N. C 625; 55 Am. Rep. 621; Madden's Admr. *v.* Chesapeake, etc., Ry. Co., 28 W. Va. 610; 57 Am. Rep. 695; St. Louis, etc., Ry. Co. *v.* Weaver, 35 Kans. 412; 57 Am. Rep. 176.

[71] Flike *v.* Boston & A. R. Co., 53 N. Y. 549; 13 Am. Rep. 545; Dobbin *v.* Richmond, etc., R. Co., 81 N. C. 446; 31 Am. Rep. 512.

In the case of a corporation necessarily acting by agents, it has been held that the principal is liable to the inferior servant for the negligent act of the superior servant, as superintendent or foreman, although the latter at the time is discharging the duties of an inferior servant under his control. But the contrary has also been held.[72]

2. Where the delegation is voluntary, and includes the power of selecting and discharging servants, or purchasing and repairing machinery and appliances, as where the agent is *alter ego*.[73] In such cases the knowledge or notification of the agent, as well as his negligence, is attributable to the principal.[74]

The master may not contract beforehand with the servant for release from liability for injury by his own or his employee's neglect.[75]

III. RIGHTS, DUTIES, AND LIABILITIES OF SERVANT TOWARD MASTER.

The servant may justify an assault in defence of his master.[76] The servant is bound to protect his

[72] Berea Stone Co. *v.* Kraft, 31 Ohio St. 287; 27 Am. Rep. 510; Crispin *v.* Babbitt, 81 N. Y. 516; 37 Am. Rep. 521.

[73] Corcoran *v.* Holbrook, 59 N. Y. 517; s. c., 17 Am. Rep. 369; Mullan *v.* Phila., etc., Steamship Co., 78 Penn. St. 25; s. c., 21 Am. Rep. 2, and note, 7; Mitchell *v.* Robinson, 80 Ind. 281; 41 Am. Rep. 812.

[74] Patterson *v.* Pittsburgh, etc., R. Co., 76 Penn. St. 389; s. c., 18 Am. Rep. 412; Ford *v.* Fitchburg R. Co., 110 Mass. 240; s. c., 14 Am. Rep. 598.

[75] Rosener *v.* Herman, 8 Fed. Rep. 782; Lake Shore, etc., Ry. Co. *v.* Spangler, 44 Ohio St. 571; 58 Am. Rep. 833; Little Rock, etc., R. Co. *v.* Eubank, 48 Ark. 460; 3 Am. St. Rep. 245. *Contra:* West. R. Co. *v.* Bishop, 50 Ga. 465.

[76] Wood, Mast. & Serv., § 289.

master's property. During the service he may not solicit the master's customers into his own business, but he may do so after the service has ended.[77] He must give the master his whole time.[77*] He may not, when his employer's lease is about to expire, secretly take to himself a lease of the same premises with the purpose of carrying on the like business there.[78] He is bound to account for his master's money, and may not set up the right of a third person in opposition.[79]

He is liable for gross negligence in the care of his master's property, but not for ordinary accidents.[80] So he is liable to indemnify his master against the consequences of his negligence or misconduct.[81] So for his fraud or misfeasance.[82] So for conspiracy to injure his master's business.[83]

If the master unlawfully terminates the service, the servant may treat the contract as continuing, and sue for damages for the breach; or he may treat it as rescinded, and recover for service rendered, *quantum meruit*.[84] In a suit for damages, the master may offset any compensation which he can prove

[77] Nichol *v.* Martyn, 2 Esp. 732.

[77*] Leach *v.* Hannibal, etc., R. Co., 86 Mo. 27; 56 Am. Rep. 935.

[78] Gower *v.* Andrew, 59 Cal. 119.

[79] Lewis *v.* Hammond, 2 B. & Ald. 207.

[80] Savage *v.* Walthew, 11 Mod. 135.

[81] Smith *v.* Foran, 43 Conn. 244; 21 Am. Rep. 647; Mobile & Mont. Ry. Co. *v.* Clanton, 59 Ala. 392; 31 Am. Rep. 15.

[82] Bac. Abr. Tit. "Master & Servant," M.

[83] Mapstrick *v.* Ramge, 9 Neb. 390; 31 Am. Rep. 415.

[84] Lilley *v.* Elwin, 11 Q. B. 742; Colburn *v.* Woodworth, 31 Barb. 381; Richardson *v.* Eagle Machine Works, 78 Ind. 422; 41 Am. Rep. 584.

that the servant might have earned by other similar employment in the same neighborhood.[85] The servant may not unnecessarily lie idle, but it is for the master to prove that he might have got other employment.

If the servant is prevented by the act of God, such as sickness, from fulfilling his engagement, he is still entitled to compensation *quantum meruit;*[86] but he cannot recover damages for the master's refusal to take him back.[87] If he leaves the employment without good excuse he is liable in damages to the master.[88] "When a servant is prevented from performing his contract *vi majore*, the question whether or not he is liable in damages for breach of contract depends on circumstances. If he is carried to prison for crime of which he is found guilty, or for a debt unpaid, then, as the contract was broken by his own voluntary act, he is liable in damages and the master is free from the contract. But if on the other hand he is carried to prison on suspicion of being guilty of a crime of which he is ultimately acquitted, he is not liable in reparation to the master, because there was no voluntary breach of engagement."[89]

[85] Fewings *v.* Tisdal, 1 Ex. 295; Sherman *v.* Cham. Trans. Co., 31 Vt. 162; Strauss *v.* Meertief, 64 Ala. 299; 38 Am. Rep. 8. The doctrine of constructive service is repudiated in Ohio. James *v.* Allen County, 44 Ohio St. 226; 58 Am. Rep. 821.

[86] Wolfe *v.* Howes, 20 N. Y. 197.

[87] Leopold *v.* Salkey, 89 Ill. 412; 31 Am. Rep. 93.

[88] Lees *v.* Whitcomb, 5 Bing. 34.

[89] Fras. Mast. & Ser. 55, § 4; King *v.* Barton, 2 M. & S. 329; Ryan *v.* Dayton, 25 Conn. 188; Melville *v.* De Wolf, 4 Ell. & B. 844; Turner *v.* Mason, 14 M. & W. 112; Fenton *v.* Clark, 11 Vt. 557.

IV. LIABILITY OF MASTER TO THIRD PERSONS.

A master is liable for the act of his servant done in the course of his employment.[90]

As to contracts, the liability is governed by the law of contracts and of agency, and does not come within my scope.

As to the servant's torts and negligence, the universal rule is, that the master is responsible in damages to third persons, for the act of his servant occasioning an injury, whether the act is of omission or commission, in conformity to or in disobedience of the master's order, by negligence, fraud, deceit, or even wilful misconduct, so long as it was in the course of the employment.[91]

But to establish this liability the relation of master and servant must exist, with its incident right of control in the master.[92] The relation of contractors does not raise the liability.[93] So if the person causing the injury is engaged on the business of another at the time, but is really the servant of a third party, that other is not liable; as where a car-

[90] Helyear *v.* Hawke, 5 Esp. 72.

[91] Smith's Mast. & Ser. 151.

[92] Kimball *v.* Cushman, 103 Mass. 194; 4 Am. Rep. 528.

[93] King *v.* N. Y. Cent. R. Co., 66 N. Y. 181; 23 Am. Rep. 37; Eaton *v.* European & N. Ry. Co., 59 Me. 520; 8 Am. Rep. 430; Cuff *v.* Newark, etc., R. Co., 35 N. J. 17; 10 Am. Rep. 205; McCarthy *v.* Second Parish of Portland, 71 Me. 318; 36 Am. Rep. 320; Bennett *v.* Truebody, 66 Cal. 509; 56 Am. Rep. 117. As to injury to contractor's servant, see Ewan *v.* Lippincott, 47 N. J. L. 192; 54 Am. Rep. 148; Louisville, etc., R. Co. *v.* Conroy, 63 Miss. 562; 56 Am. Rep. 835.

riage and horses are let out to hire by the day, week, month, or job, and the driver is selected and appointed by the owner of the carriage, the latter is liable for injury by the driver's negligence, although the carriage may be in the possession and under the control of the hirer.[94]

The master is liable for the consequences to a third person of excessive force or improper means in the execution by the servant of a lawful order.[95]

As to Negligent Acts. — Although the master would be liable for an injury through the negligence of the driver of his street car to a passenger riding without paying fare, by invitation of the driver;[96] because those in charge of the cars are employed to solicit passengers and carry them; yet he would not be liable for an injury to a bystander at a railway station, received while helping the fireman take in water, at his request;[97] nor for an injury received by a bystander while uncoupling cars at the conductor's request;[98] because these servants are not authorized to solicit such aid in their duties. But a *passenger*, assisting the railroad company's servants,

[94] Laugher *v.* Pointer, 5 B. & C. 572. See Ames *v.* Jordan, 71 Me. 540; 36 Am. Rep. 352; Joslyn *v.* Grand Rapids Ice Co., 50 Mich. 516; 45 Am. Rep. 54; Hershberger *v.* Lynch, Penn. St. ; 37 Alb. L. J. 199.

[95] Higgins *v.* Watervliet Turn. Co., 46 N. Y. 23; 7 Am. Rep. 293; Phila., etc., R. Co. *v.* Larkin, 47 Md. 155; 28 Am. Rep. 442.

[96] Wilton *v.* Middlesex R. Co., 107 Mass. 108; 9 Am. Rep. 11; Brennan *v.* Fairhaven & Westville R. Co., 45 Conn. 284; 29 Am. Rep. 679.

[97] New Orleans, etc., R. Co. *v.* Harrison, 48 Miss. 112; 12 Am. Rep. 356.

[98] Flower *v.* Penn. R. Co., 69 Penn. St. 210; 8 Am. Rep. 251.

at their request, and injured in that service, may recover of the company.[98*]

If the third person knows the servant's act is contrary to his employment, he is without remedy; as where he rides on a freight train with the conductor's assent, knowing it to be against the master's rules or orders;[99] but otherwise, if he was ignorant of the regulation.[100] Again: The master is not liable if the servant's act is so manifestly outside his employment as to carry with it presumptive notice of his want of authority, as where a third person was permitted by railway section-hands to ride on a hand-car, and there received injury.[101] And so in respect to acts of mere passive negligence resulting in injury to property, the master is not liable where the act cannot under any circumstances have been within the employment; as where a carpenter, using the plaintiff's shed for his master's work, accidentally sets it on fire in lighting his pipe.[102]

As to Wilful Acts. — The master is not liable for a wrongful, wilful, and unlawful act of his servant toward a third person, although the servant professes to be acting in the master's employment, if the act is entirely independent and outside of, and

[98*] St. Ry. Co. *v.* Bolton, 43 Ohio St. 224; 54 Am. Rep. 803; Eason *v.* Ry. Co., 65 Tex. 577; 57 Am. Rep. 606.

[99] Houston & Texas Cent. R. Co. *v.* Moore, 49 Tex. 31; s. c., 30 Am. Rep. 98.

[100] Creed *v.* Penn. R. Co., 86 Penn. St. 139; s. c., 27 Am. Rep. 693.

[101] Hoar *v.* Maine Cent. R. Co., 70 Me. 65; s. c., 35 Am. Rep. 299.

[102] Woodman *v.* Joiner, 10 Jur. (N. S.) 852; Williams *v.* Jones, 3 H. & C. 256.

having no proper connection with the employment. As if the servant should make a wanton and unprovoked assault, or wantonly drive his master's carriage against another.[103] So where through the negligence of the defendant's driver the defendant's carriage-wheels became entangled with those of the plaintiff, and the defendant's driver struck the plaintiff's horses with his whip, and they suddenly started and overturned the plaintiff's carriage, the court said: "If a servant, driving a carriage, in order to effect some purpose of his own, *wantonly* strikes the horses of another person, and produces the accident, the master will not be liable. But if, in order to perform his master's orders, he strikes, but injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master will be liable, being an act done in pursuance of the servant's employment."[104]

To illustrate this distinction: Suppose it to be the duty of a servant to unload a locomotive tender by throwing the wood overboard, and in so doing he accidentally or purposely hits and wounds a bystander; the master will be liable. But if this unloading were no part of his duty at the time, and he should purposely throw a stick at and injure a bystander, the master would not be liable. So if a hod-carrier, employed on a third person's

[103] McManus *v.* Crickett, 1 East, 106.

[104] Croft *v.* Alison, 4 B. & Ald. 590. See Limpus *v.* General Omnibus Co., 1 H. & C. 528.

house, wilfully bespattered the walls, his master would not be liable;[105] but if a painter, employed to paint the walls, should wilfully bespatter them with paint, the master would be liable. So where the crew of a vessel, without the master's knowledge or authority, fired a salute with a cannon on board, and thereby injured a third person, the master was held not liable;[106] but if they had been instructed to fire the salute, and in so doing had accidentally or purposely inflicted the injury, so long as it was not purely felonious, the master would have been liable. So where a general farm-servant, undertaking to drive out a trespassing cow from his master's field, struck her with a stone and killed her, the master was held liable.[107] And so where a toll-gate keeper, not required to collect toll after nine o'clock at night, let the beam of the gate down upon the plaintiff, who was endeavoring to pass after that hour, and injured him, the company was held liable.[108] So where a ferry pilot took on a boatman, agreeing to put him on his tow in the river without compensation, and diverging from his regular course to do so, collided with a canal-boat and killed a man, the employer was held liable.[109] So where a railway company had ordered its gate-keepers not to allow passengers to go out unless they surrendered tickets or paid fares, and a passenger having lost

[105] Garvey *v.* Dung, 30 How. Pr. 315.
[106] Haack *v.* Fearing, 4 Abb. Pr. (N. S.) 297.
[107] Evans *v.* Davidson, 53 Md. 245; 36 Am. Rep. 400.
[108] Noblesville, etc., Co. *v.* Gause, 76 Ind. 142; 40 Am. Rep. 224.
[109] Quinn *v.* Power, 87 N. Y. 535; 41 Am. Rep. 392.

his ticket refused to pay his fare, and the gate-keeper caused his arrest by the police, the company was held liable.[109a] But where a solicitor's clerk used a lavatory in his master's office, in disobedience of his master's orders, and left the water turned on, and it overflowed and injured the premises of a tenant below, it was held that the master was not liable.[110]

But in respect to public carriers it is held that the master owes the duty of protection of his passengers against even wanton assaults by his servants, entirely disconnected from the employment. As where a railway conductor kissed a female passenger against her will;[110a] or assaulted a passenger on demanding his ticket;[111] or brakemen unlawfully ejected a passenger by the conductor's order;[112] or officers of a steamboat assaulted a passenger;[113] or an engineman maliciously sounded a locomotive whistle;[114] or a street-car driver threw one off the car platform who had stepped on it to

[109a] Lynch *v.* Metropolitan Elevated Ry. Co., 90 N. Y. 77; 43 Am. Rep. 141. See Stewart *v.* Brooklyn Crosstown R. Co., 90 N. Y. 588.

[110] Stevens *v.* Woodward, 6 Q. B. Div. 318 (but see Ruddeman *v.* Smith, Q. B. Div.).

[110a] Croaker *v.* Chicago, etc., Ry. Co., 36 Wis. 657; s. c., 17 Am. Rep. 504.

[111] Goddard *v.* Grand Trunk Ry. Co., 57 Me. 202; s. c., 2 Am. Rep. 39.

[112] Passenger Ry. Co. *v.* Young, 21 Ohio St. 518; s. c., 8 Am. Rep. 78.

[113] Bryant *v.* Rich, 106 Mass. 180; s. c., 8 Am. Rep. 311; Sherley *v.* Billings, 8 Bush, 147; s. c., 8 Am. Rep. 451.

[114] Chicago, etc., Ry. Co. *v.* Dickson, 63 Ill. 151; s. c., 14 Am. Rep. 114; Nashville, etc., R. Co. *v.* Starnes, 9 Heisk. 52; s. c., 24 Am. Rep. 296.

cross the street;[115] or a brakeman kicked a trespasser from the platform of a baggage car in motion;[116] or a baggage-master struck with a hatchet a passenger in a quarrel about baggage;[117] or a brakeman assaulted a passenger, who, resenting the ejection of his dog from a car, first laid hands on the brakeman;[118] even for a malicious and criminal assault by the servant on a passenger in carrying out a supposed order of the master;[119] or where a passenger accused a brakeman of having stolen his watch, and the brakeman thereupon struck him;[120] or where the brakeman in washing out a car directed a jet of water purposely upon a passenger.[121] On the other hand, it has been held that the employer was not liable where a street-car conductor pushed a passenger off who was about to alight.[122] So where a brakeman put a trespasser off a freight train in motion without orders from the conductor.[123] So where a railway conductor

[115] Shea *v.* Sixth Ave. R. Co., 62 N. Y. 180; s. c., 20 Am. Rep. 480.

[116] Rounds *v.* Delaware, etc., R. Co., 64 N. Y. 129; 21 Am. Rep. 597; Hoffman *v.* N. Y. C. & H. R. R. Co., 87 N. Y. 25; 41 Am. Rep. 337.

[117] Little Miami R. Co. *v.* Wetmore, 19 Ohio St. 110; s. c., 2 Am. Rep. 373.

[118] Hanson *v.* European & N. A. Ry. Co., 62 Me. 84; s. c., 16 Am. Rep. 404.

[119] McKinley *v.* Chicago, etc., Ry. Co., 44 Iowa, 314; s. c., 24 Am. Rep. 748.

[120] Chicago, etc., Ry. Co. *v.* Flexman, 103 Ill. 546; 42 Am. Rep. 33.

[121] Terre Haute, etc., R. Co. *v.* Jackson, 81 Ind. 19.

[122] Isaacs *v.* Third Ave. R. Co., 47 N. Y. 122; 7 Am. Rep. 418. Substantially overruled by later cases.

[123] Marion *v.* Chicago, etc., Ry. Co., Iowa Sup. Ct.

had a passenger wrongfully arrested for giving him counterfeit money for his fare.[124] And so where a railway conductor stopped his train near the plaintiff's house, entered the premises, seized the plaintiff's minor son, and carried him off on the train by force.[125] So where a street-car driver followed a passenger and assaulted him.[125*] So where a conductor had a passenger arrested for giving him bad money for his fare.[125†]

Even if the third person is a trespasser, the master is liable for any excess of force used by the servant, or any improper execution of his order; as where an intruder was pushed off a train in a violent manner at a dangerous place.[126] But for the servant's criminally malicious and wilful act the master is not liable;[127] as for an intentional killing.

The master is liable for the trespass of his servant committed by his order;[128] or in his presence with his foreknowledge;[129] but not when committed against his order.

The test of the master's responsibility is not whether the act was done according to his instructions, but whether it was done in the prosecution of

[124] Galveston, etc., R. Co. *v.* Donahoe, 56 Tex. 162.

[125] Gilliam *v.* Southern, etc., R. Co., 70 Ala. 268.

[125*] Cent. Ry. Co. *v.* Peacock, 69 Md. 257.

[125†] Charleston *v.* London, etc., Co., Q. B. Div.; 37 Alb. L. J. 102.

[126] Rounds *v.* Del. L. & W. R. Co., 64 N. Y. 129; 21 Am. Rep. 597; Carter *v.* Louisville, etc., Ry. Co., 98 Ind. 552; 49 Am. Rep. 780.

[127] Frazer *v.* Freeman, 43 N. Y. 566; 3 Am. Rep. 740.

[128] Barden *v.* Felch, 109 Mass. 154.

[129] Chandler *v.* Broughton, 1 C. & M. 29.

the business that the servant was employed by the master to do.[130] As where the superintendent of a lumber yard, in violation of his employer's directions, piled lumber on a sidewalk, where it fell and injured a person; the master was held liable.[131]

In regard to the matter of disobedience this distinction must be observed. If the servant in doing a particular act in a particular manner departs from the appointed mode of performance to inflict a wanton injury on a third person, the master will not be liable. As where the owner of a building instructs his servant to throw the snow from the roof into a vacant adjoining lot, where no one would be endangered, and the servant, disregarding the direction, carelessly throws it into the street and injures a person, the master will be liable; but if the servant intentionally threw it on the passer, the master would not be liable, for he had not engaged the servant to throw snow into the street.[130]

If the master vests the servant with any discretion, the master is liable to third persons for the consequences of the servant's abuse or mistake in its exercise.[132]

The master is liable for the consequences to third persons of the acts of the servant's servant in all cases where he would be liable for the same act if

[130] Cosgrove *v.* Ogden, 49 N. Y. 255; s. c., 10 Am. Rep. 361; King *v.* N. Y. Cent., etc., R. Co., 66 N. Y. 181; s. c., 23 Am. Rep. 37.

[131] Garretzen *v.* Duenckel, 50 Mo. 104; s. c., 11 Am. Rep. 405.

[132] Limpus *v.* Gen. Omnibus Co., 1 H. & C. 528. Consult Chicago, etc., Ry. Co. *v.* McMahon, 103 Ill. 485; 42 Am. Rep. 29.

done by his servant. As where one, employed to shovel snow from a roof, engaged another to help him, who threw snow on a passer and injured him, the latter recovered from the master.[133]

Where the injury to the third person occurs while the servant is acting in his own business, although in his master's time and with his master's appliances, the master is not liable.[134]

V. LIABILITY OF SERVANT TO THIRD PERSONS.

In respect to contract liability, as a rule servants are not liable to third persons on contracts made on behalf of their masters, unless they act without or in excess of authority.[135]

For misfeasance or positive wrong the servant is liable to third persons.[136] But for mere negligence or non-feasance the servant is not so liable;[137] as for neglect to collect a note;[138] or loss of a parcel.[139]

The servant is liable for his negligence toward a fellow-servant.[140]

It has been held that a joint action will lie against master and servant for a personal injury caused by

[133] Althorf *v.* Wolfe, 22 N. Y. 355; Quarman *v.* Burnett, 6 M. & W. 499.

[134] Stone *v.* Hills, 45 Conn. 44; 29 Am. Rep. 635, and note, 640.

[135] Smout *v.* Ilberry, 10 M. & W. 1.

[136] Sands *v.* Child, 3 Lev. 352; Bennett *v.* Ives, 30 Conn. 329.

[137] Lane *v.* Cotton, 12 Mod. 488.

[138] Montgomery Bank *v.* Albany Bank, 7 N. Y. 459.

[139] Williams *v.* Cranston, 2 Stark. 82.

[140] Osborne *v.* Morgan, 130 Mass. 102; 39 Am. Rep. 437; Hinds *v.* Overacker, 66 Ind. 547; 32 Am. Rep. 114.

the negligence of the latter in the absence of the former.[141]

VI. LIABILITY OF THIRD PERSONS TO MASTER.

The master has a right of action against a third person for injury to his servant causing loss of service.[142] The action of seduction is a common example. It has been held that this right exists only in respect to menial servants,[142] but this seems questionable.

The right exists against a passenger carrier for wrongful delay in carrying a servant.[143]

The right exists against one who entices away the servant knowingly and wilfully.[144] But not unless the servant was in the actual service at the time.[145] The ingredients of this action are: (1) actual service; (2) knowledge of it in the defendant; (3) wrongful intent; (4) the servant's desertion in consequence of the solicitation.

An action also lies for harboring a servant after notice that his services are due to another.[146]

[141] Phelps *v.* Wait, 30 N. Y. 78.

[142] Burgess *v.* Carpenter, 2 S. C. 7; 16 Am. Rep. 643.

[143] Ames *v.* Union Ry. Co., 117 Mass. 541; 19 Am. Rep. 426.

[144] Daniel *v.* Swearengen, 6 S. C. 297; 24 Am. Rep. 471; Bixby *v.* Dunlap, 56 N. H. 456; 22 Am. Rep. 475, and note, 485.

[145] Caughey *v.* Smith, 47 N. Y. 244.

[146] Fawcet *v.* Beavres, 2 Lev. 63.

INDEX.

INDEX.

A.

B.

C.

D.

E.

F.

G.

H.

I.

M.

N.

P.

Q.

R.

S.

T.

V.

W.